APPENDIX.

Petition for Writ of Error.

In the Supreme Court of the State of Oklahoma.

Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York,
Plaintiffs in Error,
vs.
Ivolue B. West,
Defendant in Error.
No. 1928.

Come now the above-named Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, plaintiffs in error, and say: That on the 9th day of April, 1910, a judgment was rendered in the District Court within and for the Third Judicial District, Muskogee County, State of Oklahoma, against the plaintiff in error, Missouri, Kansas & Texas Railway Company, for fifteen thousand ($15,000.00) dollars, in favor of the defendant in error, Ivolue B. West; that pursuant to the civil statutes of the State of Oklahoma said cause was appealed to the Supreme Court of the State of Oklahoma, where, on the 20th day of June, 1912, this Court handed down its opinion affirming the judgment of the trial court; that thereafter, pursuant to the civil statutes of the State of Oklahoma, and on the 26th day of June, 1912, a petition for rehearing was filed, presented, considered, and on the 4th day of February, 1913, granted by this Court, and thereafter, and on the 6th day of August, 1913, this Court handed down its opinion on rehearing affirming the judgment of the trial court, which judgment thereupon became final; that the Supreme Court of the State of Oklahoma is the highest court in said State in which a de-

cision in this action could be had; that these plaintiffs in error, the said Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, were and are aggrieved in that in said judgment and proceedings had prior thereto in this case, certain errors were committed to their prejudice; that this is an action brought by the defendant in error, Ivolue B. West, as the widow of William B. West, deceased, for damages for his death alleged to have been caused through the negligence of the plaintiff in error, Missouri, Kansas & Texas Railway Company, and its servants; that this plaintiff in error, Missouri, Kansas & Texas Railway Company, is, and was, at the time of the injuries resulting in the death of the said William B. West, a common carrier by railroad, engaged in interstate commerce, and the deceased, William B. West, was, at the time of the injuries resulting in his death, employed by the plaintiff in error Railway Company in such commerce, being employed as baggageman, and was, at the time, handling interstate baggage upon a train of the plaintiff in error, Railway Company, which was at the time engaged in moving interstate traffic; and plaintiffs in error, therefore, contended, and still contend, in said action that defendant in error had no right to maintain this suit, but that same could only be maintained by the personal representative of the deceased, as contemplated by the Act of Congress approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employes in Certain Cases," and that by this action there therefore was drawn in question the construction of said statute, and the decision of this Court is against the right claimed by these plaintiffs in error to insist that said action should have been so brought, and is, as it be-

lieves, contrary to the said statute of the United States relating to actions for the death of persons while in the employ of common carriers by railroad and engaged in commerce between the several States, as contemplated by said Act; that in said action rights, privileges and immunities were claimed by your petitioners under the Constitution and Statutes of the United States, and under authority exercised under the United States, and the decision of the said Supreme Court of the State of Oklahoma was against the rights, privileges and immunities especially set up and claimed under said Constitution, statutes and authority; all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore, said plaintiffs in error pray that a writ of error may issue to the Supreme Court of the State of Oklahoma for the correction of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to the United States Supreme Court.

JOSEPH M. BRYSON,
CLIFFORD L. JACKSON,
WILLIAM R. ALLEN,
MAURICE D. GREEN,
Attorneys for Plaintiffs in Error.

Allowed by:

SAMUEL W. HAYES,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

W. H. L. CAMPBELL,
Clerk.

By JESSE PARDOE,
(SEAL) *Deputy.*

Endorsed:

No. 1928. In the Supreme Court of the State of Oklahoma. Missouri, Kansas & Texas Railway Company, Plaintiff in Error, v. Ivolue B. West, Defendant in Error. Petition for Writ of Error. Filed Aug. 11, 1913. W. H. L. Campbell, Clerk. (Rec., pp. 6-9.)

ORDER ALLOWING WRIT OF ERROR.

In the Supreme Court of the State of Oklahoma.

Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, Plaintiffs in Error,	No. 1928.
vs.	
Ivolue B. West, Defendant in Error.	

Now, on this 11th day of August, 1913, come the Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, plaintiffs in error, and file and present to this Court their petition praying for the allowance of a writ of error intended to be urged by them; and praying further that a duly authenticated transcript of the record, proceedings and papers, upon which the judgment herein was tendered, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this Court, desiring to give petitioners an opportunity to test in the Supreme Court of the United States the questions therein presented, it is ordered by this Court that writ of error be allowed as prayed; provided, however, that the said Missouri, Kansas & Texas Railway Company, National Surety

Company and American Surety Company of New York, plaintiffs in error, give bond, according to law, in the sum of thirty thousand ($30,000.00) dollars, which said bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this 11th day of August, 1913.

SAMUEL W. HAYES,
(SEAL) *Chief Justice of the Supreme Court of the State of Oklahoma.*

Attest:
W. H. L. CAMPBELL, *Clerk.*
By JESSE PARDOE, Deputy.

Endorsed: In the Supreme Court of the State of Oklahoma. No. 1928. Missouri, Kansas & Texas Railway Company *et al.*, Plaintiff in Error, v. Ivolue B. West, Defendant in Error. Order allowing writ of error. Filed Aug. 11, 1913. W. H. L. Campbell, Clerk. (Rec., p. 27.)

WRIT OF ERROR.

United States of America—ss:

The President of the United States to the Honorable, the Justices of the Supreme Court of the State of Oklahoma—GREETING:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oklahoma before you, or some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit between Missouri, Kansas & Texas Railway Company, as plaintiff in error, and Ivolue B. West, as defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an

authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, plaintiffs in error, as by their complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this eleventh day of August, in the year of our Lord One Thousand Nine Hundred Thirteen.

Done in the City and County of Oklahoma, State of Oklahoma, with the seal of the District Court of the United States for the Western District of the State of Oklahoma attached.

ARNOLD C. DOLDE,
(SEAL.) *Clerk of the District Court of the United States for the Western District of the State of Oklahoma.*

By .....,
Deputy Clerk.

Allowed by:

SAMUEL W. HAYES,
Chief Justice of the Supreme Court of Oklahoma.

I hereby certify that a copy of the within writ of error was, on the 11th day of August, 1913, lodged in the clerk's office of the said Supreme Court of the State of Oklahoma by the plaintiffs in error for the defendant in error.

W. H. L. CAMPBELL,
(SEAL.) *Clerk of the Supreme Court of the State of Oklahoma.*

By JESSE PARDOE, *Deputy.*

Endorsed: No. ——. In the Supreme Court of the United States. Missouri, Kansas & Texas Railway Company *et al.*, Plaintiffs in Error, v. Ivolue B. West, Defendant in Error. Writ of Error. Filed Aug. 11, 1913. W. H. L. Campbell, Clerk. (Rec., pp. 28-30.)

ASSIGNMENTS OF ERROR.

In the Supreme Court of the United States.

Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York,
Plaintiffs in Error,
vs.
Ivolue B. West,
Defendant in Error.
No. ——.

Come now the Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, plaintiffs in error in the above-entitled cause, and aver and show that in the foregoing record and proceedings in said cause there is manifest error in the action and rulings of the District Court, within and for the Third Judicial District, Muskogee County, State of Oklahoma, as well as in the action, rulings and opinion of the Supreme Court of the State of Oklahoma, in this, to-wit:

I.

The trial court erred in overruling the objection of the plaintiff in error, Missouri, Kansas & Texas Railway Company, to the introduction of any evidence in the case, and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

II.

The trial court erred in refusing to admit in evidence the application for a situation of William B. West with the American Express Company, which application contained the accident release executed by the said

William B. West, the benefits of which inured to the plaintiff in error, Missouri, Kansas & Texas Railway Company. Said application for situation and accident release executed by the said William B. West being marked "Defendant's Exhibit A", and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

III.

The trial court erred in refusing to admit in evidence the application for a situation of William B. West with the American Express Company, which application contained the accident release executed by the said William B. West, the benefits of which inured to the plaintiff in error, Missouri, Kansas & Texas Railway Company. Said application for situation and accident release being marked "Defendant's Exhibit B", and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

IV.

The trial court erred in refusing to admit in evidence the application for a situation of William B. West, with the American Express Company, which application contained the accident release executed by the said William B. West, the benefits of which inured to the plaintiff in error, Missouri, Kansas & Texas Railway Company. Said application for situation and accident release being marked "Defendant's Exhibit C", and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

V.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

"(1) The Court instructs the jury to find the issues in favor of the defendant."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

VI.

The trial court erred in instructing the jury as follows, to-wit:

"(1) You are instructed that this action is brought by the plaintiff as the widow of William B. West, for the benefit of herself as such widow and of the minor children of herself and of said William B. West, deceased, for the alleged negligent killing of her husband while he was running upon one of the defendant's trains as an express messenger in the employ of the American Express Company.

"Plaintiff alleges that at and prior to the time of the death of said William B. West he was employed by the American Express Company as a messenger, upon the express cars operated by the defendant company over its line of railroad between Parsons, Kansas, through the State of Oklahoma to points beyond in the State of Texas; that in addition to his duties as express messenger said West was also engaged in handling passenger baggage upon the express cars of the defendant company. That on May 15, 1908, at about 12 o'clock noon of said day, said William B. West, in the course of his employment, was riding in one of the express cars of the defendant company, then be-

ing operated by defendant over its railroad in a southerly direction, through the State of Oklahoma, upon its train known as the 'Katy Flyer'; that when said train reached a short distance south of the Arkansas River between the stations of Verdark and Muskogee, said train, through gross carelessness and negligence upon the part of the railroad company, and while said train was running at a high and dangerous rate of speed, caused and allowed to collide in a head-end collision with a locomotive and freight train, also owned, operated and maintained by said defendant company and which freight train was also, through the gross carelessness and negligence of said defendant company, being run and operated by said defendant company upon the same track, in a northerly direction, at a high and dangerous rate of speed; and that the said William B. West was by said collision and by the gross carelessness and negligence on the part of the defendant, and without any fault or neglect upon his part, was then and there caused to sustain and receive personal injuries which resulted in his immediate death. Plaintiff brings suit in the sum of $50,000.00 for said killing.

"The defendant has filed an answer, which, after denying each and every material allegation in plaintiff's petition, avers that if the said William B. West was injured and killed at the time, place, and in the manner alleged, his death was not due to any negligence on the part of the defendant, or any of its servants, agents, or employes, but was due solely to the negligence on the part of the said William B. West. Defendant further alleges in its answer that the defendant, before entering into the service of this company, had executed two certain contracts to the American Express Company by which claim for damages for injuries were

waived and released and in which contract he agreed to release any railroad on which he might be working at the time of any injury, and that the plaintiff is now barred from maintaining this action."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

VII.

The trial court erred in instructing the jury as follows, to-wit:

"(2) You are further instructed that the jury are the sole judges of the weight of the testimony and credibility of the witnesses, but the law of the case is that which is given to you by the Court in these instructions, and you are to be governed by no other law. In determining the weight of the testimony and credibility of the witnesses, you have the right to look to each witness as he conducted himself while upon the witness stand, to his fairness or lack of fairness, to his intelligence or his incapacity, as the same appeared to you, to his interest in the case, if any, and you have the right to look to each and every surrounding circumstance that appears in the testimony. If there is a conflict between the different parts of the testimony of any witness, it is your duty to reconcile the same, if this can be done, upon the theory that each witness has spoken the truth; but if this cannot be done then you may disregard any part of the testimony of any witness, or all of his testimony, as you may see fit under the surrounding facts and evidence in the case. If you believe from the evidence that any witness has willfully testified falsely to any fact material to the issue in this

case, then you are at liberty to disregard any part or the whole of the testimony of such witness."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

VIII.

The trial court erred in instructing the jury as follows, to-wit:

"(3) The burden is upon the plaintiff to sustain her contention by a preponderance of the testimony. By this is meant the greater weight of the testimony, and not necessarily the number of witnesses testifying upon the one side or the other."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

IX.

The trial court erred in instructing the jury as follows, to-wit:

"(4) You are instructed that it is the duty of a railway company to so conduct, maintain and run its trains used in its business in such a manner as to prevent injury to persons riding on said trains."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

X.

The trial court erred in instructing the jury as follows, to-wit:

"(4½) By 'ordinary care', as that term is used in these instructions, is meant that degree of care

which a person of reasonable prudence and caution would likely use and exercise under the same or similar circumstances and conditions, and a failure to use such care is negligence on the part of the person or corporation guilty of such failure. That is to say, negligence is the failure to do or perform some act or the doing of some act which, from the nature of the act and under the circumstances, may result in injury or damage to the person or property of others, and which a person of reasonable prudence would or would not do, as the case may be, under the same or similar circumstances, and the rule here stated applies equally to persons and corporations, the latter, that is, corporations, being chargeable with the negligence, if any, committed by their officers, agents and employes in the discharge of their duty as such."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XI.

The trial court erred in instructing the jury as follows, to-wit:

"(5) Now bearing in mind these instructions and applying them carefully to the evidence before you, if you believe and find from a preponderance of the testimony that on or about the 15th day of May, 1908, in the County of Muskogee, William B. West was personally injured by being in a wreck caused by a collision between the 'Katy Flyer' and one of defendant's freight trains on its line of railroad south of the Arkansas River bridge, and you further find that such injury was the direct or proximate result of the negligence of the defendant, its agents, officers or employes to properly conduct and run its trains on said

railroad track; that is, if you so find and believe that the injuries sustained by William B. West was the direct or proximate result of the failure of defendant, its officers, agents or employes to exercise that degree of diligence and care to prevent injury to others as a person of ordinary caution and prudence would likely have used under the same or similar circumstances, and you further find that such injury caused the death of the said William B. West, then it will be your duty to return a verdict in favor of the plaintiff herein for such sum, as, in your judgment, the evidence shows her to be entitled to under other instructions given you in this case."

and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XII.

The trial court erred in instructing the jury as follows, to-wit:

"(6) If you find for the plaintiff in this case, then in assessing the damages which she is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the widow and children of the deceased, and determining this, you may consider the probable earnings of the deceased, his age, experience, habits, health and bodily qualifications, during what probably would have been his lifetime if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition."

and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XIII.

The trial court erred in instructing the jury as follows, to-wit:

> "(7) Nine of the jury concurring is sufficient to return a verdict for plaintiff or defendant and if the verdict is rendered by nine or more, but by less than the whole number of jurors, then the jurors who concur in the verdict must sign their names thereto. If the verdict is concurred in by the entire jury, then you will select some one of your number foreman and have him sign the verdict as such foreman and return it into court."

and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XIV.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

> "(2) If you find from the evidence in this case that the deceased, W. B. West, was not an employe of the defendant, then the defendant would not be liable unless you should further find that the defendant was guilty of gross negligence and that as a result of such negligence the deceased was killed."

and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XV.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

"(3) If you find from the evidence in this cause that the said W. B. West was employed by the defendant as baggage master and was acting as such at the time of his death you will find the issues in favor of the defendant."

and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XVI.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas, & Texas Railway Company, as follows, to-wit:

"(4) If you find from the evidence in this cause that the deceased W. B. West was an employe of the defendant, at the time he received the injuries which caused his death, and that as such employe he was engaged in interstate commerce, as hereafter explained, then the laws of the United States would govern the liability of the defendant herein."

and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XVII.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

"(5) If you find from the evidence in this action that the deceased W. B. West at the time he received the injuries which caused his death was not an employe of the defendant, and if you further find that the deceased W. B. West entered into the contract introduced in evidence stipulat-

ing for a release of the defendant, then your verdict should be for the defendant."

and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XVIII.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

"(6) If you find from the evidence that the train upon which West was working at the time of his death engaged in commerce between the States and that he was an employe of the defendant, the plaintiff is not entitled to recover."

and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XIX.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

"(7) If you should find for the plaintiff your verdict should be for such amount as would compensate the plaintiff for the financial loss sustained and you are not to permit your sympathy to influence your verdict. The plaintiff is not entitled to recover for loss of the society of deceased nor for mental anguish—your verdict must be based upon the financial loss in dollars and cents."

and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XX.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

> "(8) If you find for the plaintiff your verdict must not exceed ten thousand dollars."

and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XXI.

The trial court erred in overruling the objection of the plaintiff in error, Missouri, Kansas & Texas Railway Company, to the making and rendering of the verdict rendered by the jury in this cause, and the Supreme Court of Oklahoma erred in not correcting this error of the trial court.

XXII.

The trial court erred in refusing to set aside the verdict in this case and to award the plaintiff in error, Missouri, Kansas & Texas Railway Company, a new trial because the damages awarded by the jury were excessive and appear to have been given under the influence of passion and prejudice, and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XXIII.

The trial court erred in overruling the motion of the plaintiff in error, Missouri, Kansas & Texas Railway Company, for a new trial, and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XXIV.

The trial court erred in refusing to grant to the plaintiff in error, Missouri, Kansas & Texas Railway Company, a new trial, and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XXV.

The trial court erred in refusing to render a judgment against the defendant in error and in favor of the plaintiffs in error, and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XXVI.

The trial court erred in rendering judgment in favor of the defendant in error and against the plaintiffs in error and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XXVII.

The Supreme Court of the State of Oklahoma erred in not reversing the judgment of the trial court within and for the Third Judicial District, Muskogee County, State of Oklahoma, because of each of the several errors of the latter court as to its actions and rulings as to each and every one of the several errors above specified.

XXVIII.

The Supreme Court of the State of Oklahoma erred in affirming the judgment of the trial court within and for the Third Judicial District, Muskogee County, State of Oklahoma, in this cause, and in not correcting

said errors and in not reversing said judgment of the said trial court.

XXIX.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the deceased, William B. West, was not an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company, at the time of the injury resulting in his death.

XXX.

The Supreme Court of the State of Oklahoma erred in holding that the deceased, William B. West, was employed exclusively by the American Express Company at the time of the injury resulting in his death.

XXXI.

The Supreme Court of the State of Oklahoma erred in holding that William B. West, deceased, was an employe of the Express Company only and not of the Railway Company, the evidence being undisputed in this case that the said William B. West, deceased, was a joint employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company, and the American Express Company, and the parties to this cause in their pleadings and both parties and the trial court throughout the trial proceeding on the theory that West was an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company, at the time of the accident resulting in his death.

XXXII.

The Supreme Court of the State of Oklahoma erred in holding in its opinion and judgment that under the

issues as framed in this case, the said deceased, William B. West, was an employe of the said American Express Company, and not of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXIII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the petition of the defendant in error did not allege that the deceased, William B. West, was an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXIV.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the answer of the plaintiff in error, Missouri, Kansas & Texas Railway Company, upon which the case was tried, did not allege that the deceased, William B. West, was an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXV.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the reply of the defendant in error to the answer of the plaintiff in error, Missouri, Kansas & Texas Railway Company, upon which the case was tried, did not admit that the deceased, William B. West, was an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXVI.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the plead-

ings of the defendant in error did not allege that William B. West, deceased, was an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXVII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the pleadings of the plaintiff in error, Missouri, Kansas & Texas Railway Company, did not allege that William B. West, deceased, was an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXVIII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the parties to this case did not join an issue of fact as to whether William B. West, deceased, was an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXIX.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that there were no averments in the pleadings in this case from which an inference might reasonably be drawn that a contract of employment was entered into between the deceased and the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XL.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the rule

> "that if, during the course of the trial, it develops that the real case is not controlled by the State statute but by a Federal statute and the case is

commenced under the former, the case pleaded is not proved and the case proved is not pleaded''

is not applicable to this case.

XLI.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the deceased, William B. West, was a passenger upon the train of the plaintiff in error, Missouri, Kansas & Texas Railway Company, at the time of his injury, resulting in his death.

XLII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the act of Congress of April 22nd, 1908, 35 U. S. Statutes-at-Large, page 65, entitled, ''An Act relating to liability of common carriers by railroad to their employes in certain cases'' does not apply to and control the question of the liability of the plaintiff in error, Missouri, Kansas & Texas Railway Company, on account of the injuries resulting in the death of the said William B. West.

XLIII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that sections 5945 and 5946 of the Compiled Laws of the State of Oklahoma of 1909, Snyder, as modified by section 7, article 23, of the Constitution of the State of Oklahoma, govern this case.

XLIV.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that section 2907 of the Compiled Laws of Oklahoma, 1909, Snyder, applies to this case.

XLV.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that this action could be properly brought or maintained under the laws of the State of Oklahoma.

XLVI.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that section 7, article 23, of the Constitution of the State of Oklahoma, defines the rights of the defendant in error as to any matters involved in this case.

XLVII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that section 8, article 23, of the Constitution of the State of Oklahoma, applies to any matters involved in this case.

XLIX.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the said contracts offered in evidence, being the applications of the deceased, William B. West, for situations with the said American Express Company, which said applications contain the accident releases executed by said William B. West, the benefits of which inured to the plaintiff in error, Missouri, Kansas & Texas Railway

Company, and marked "Defendant's Exhibits A, B and C," respectively, and each of them, are void on account of being in contravention of the laws of the State of Kansas and of the Constitution of the State of Oklahoma.

L.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that it was not clear that the contracts offered in evidence, being the plaintiff in error, Missouri, Kansas & Texas Railway Company's, Exhibits A, B and C, and each of them, covered the employment in which the deceased, William B. West, was engaged at the time of his death and that this would be a sufficient ground for refusing to admit them in evidence.

LI.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the evidence in this case as to the employment of William B. West by the plaintiff in error, Missouri, Kansas & Texas Railway Company was not sufficient to take the case to the jury on the question of such employment.

LII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the amount of damages awarded in this case was not excessive.

LIII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment wherein it stated that

> "From a careful investigation of the entire record, we are persuaded that if we should reverse the judgment of the court below upon the ground that the deceased suffered the injuries which resulted in his death while he was employed by the railway company, we would compel the widow to abandon the tenable theory upon which she brought the case and to accept one less advantageous to her and her children and one which it would be difficult, if not impossible, to establish."

LIV.

The Supreme Court of the State of Oklahoma erred in affirming the judgment of the trial court in this case as it is shown from said opinion of said Supreme Court of the State of Oklahoma that it asserted as a reason for affirming said judgment of the trial court the following:

> "From a careful investigation of the entire record, we are persuaded that if we should reverse the judgment of the court below upon the ground that the deceased suffered the injuries which resulted in his death while he was employed by the railway company, we would compel the widow to abandon the tenable theory upon which she brought the case and to accept one less advantageous to her and her children and one which it would be difficult, if not impossible, to establish."

LV.

The Supreme Court of the State of Oklahoma erred in the opinion and judgment in denying and in not

giving to the plaintiff in error, Missouri, Kansas & Texas Railway Company, its rights under the Constitution, statutes and laws of the United States with reference to interstate commerce, for the reason that the plaintiff in error, Missouri, Kansas & Texas Railway Company, is, and was at the time of the injuries resulting in the death of the said William B. West, a common carrier by railroad, engaged in interstate commerce, and the deceased, William B. West, was, at the time of the injuries resulting in his death, employed by the plaintiff in error, Missouri, Kansas & Texas Railway Company, in such commerce, being employed as baggageman, and was at the time handling interstate baggage upon a train of the plaintiff in error, Missouri, Kansas & Texas Railway Company, which was engaged in moving interstate traffic.

LVI.

The Supreme Court of the State of Oklahoma erred in denying and in not giving to this plaintiff in error, Missouri, Kansas & Texas Railway Company, rights and immunities set up and claimed by said plaintiff in error under and by virtue of the Act of Congress approved April 22nd, 1908, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," found at page 65 of Vol. 35, U. S. Statutes at Large, which rights and immunities so claimed, were as follows: This is an action brought by the defendant in error, who is the widow of the said William B. West, deceased, and brought by her for herself and minor children, but not in a representative capacity, and she had not been appointed personal representative of the estate of the said William B. West, and the pleadings and admitted facts

show that the said William B. West met his death while engaged as an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company, in interstate commerce, the said West acting as baggageman for said plaintiff in error, Missouri, Kansas & Texas Railway Company, between the points of Parsons, in the State of Kansas, through Oklahoma, and to Dallas, in the State of Texas, this said plaintiff in error, Missouri, Kansas & Texas Railway Company, being engaged as common carrier by railroad in interstate commerce at the time of the accident resulting in the death of the said William B. West, and under the provisions of said Act of Congress, the defendant in error had no right of action, and this action could not be maintained, but notwithstanding this Act of Congress, the Supreme Court of the State of Oklahoma held she could maintain the action.

Wherefore, for these and other manifest errors appearing in the record, the said Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, plaintiffs in error, pray that the said judgment of the said Supreme Court of the State of Oklahoma be reversed, set aside, and held for naught, and that judgment be rendered for the plaintiffs in error, granting to them their rights under the statutes and laws of the United States, and the said plaintiffs in error also pray judgment for their costs.

JOSEPH M. BRYSON,
CLIFFORD L. JACKSON,
WILLIAM R. ALLEN,
MAURICE D. GREEN,
Attorneys for Plaintiffs in Error.

(Rec., pp. 10-26.)

(Note.—Assignments or error numbered 1 to 26, inclusive, filed in this Court are the same as the assignments of error made by the Railway Company on appeal to the State Supreme Court and it is not deemed necessary to include herein separately such assignments.)

PETITION.

Plaintiff complains of defendant and alleges:

1. That defendant now is and during all the times herein mentioned has been a railroad corporation, duly created, organized, and existing under and by virtue of the laws of the State of Kansas, and as such, during all of said times, has been engaged in the railroad business in the State of Kansas and Oklahoma, and elsewhere as a common carrier of freight, express, and passengers for hire.

2. That during all the times herein mentioned said defendant corporation, as a part of its said railroad business, owned and was engaged in operating a certain line of railroad, extending from St. Louis, Missouri, southerly to Parsons, Kansas, and thence from Parsons, Kansas, southerly to the stations of Verdark and Muskogee in the State of Oklahoma, and thence southerly through the State of Oklahoma, to points in the State of Texas, over which line of railroad said defendant, during all the times herein mentioned was actually engaged in carrying and transporting freight, express and passengers for hire, by trains of cars drawn by steam locomotives by it owned, operated and maintained. That said line of railroad consisted of what is known as a single track line and was and is of the usual form of construction, and by said defendant, owned and maintained.

3. That William B. West, deceased, hereinafter named, left him surviving, as his only heirs-at-law, the plaintiff herein, his widow, who is thirty-six (36) years of age, and three minor children whose names and ages are as follows, viz: Norma H. West, aged sixteen; Glenford B. West, aged seven years, and Wilmetta M. West, aged two years, and also a posthumous child, born June 29, 1908.

4. That this action is brought by the plaintiff as widow of said William B. West, and for the benefit of herself, as such widow, and of said minor children of herself and of said William B. West, deceased.

That said William B. West, at the time of his death, as hereinafter set out, was, and for many years prior thereto, had been a resident of the County of Labette, in the State of Kansas, and that plaintiff during all the times herein mentioned has been and still is a resident of said county, and no personal representative of the estate of said William B. West, deceased, has been appointed.

5. That at and prior to the time of the death of said William B. West, deceased, he was employed by the American Express Company, as express messenger upon the express cars operated by said defendant company, over its said line of railroad operated between said City of Parsons, Kansas, through the State of Oklahoma, to points beyond in the State of Texas.

That in addition to his duties and employment as express messenger, as aforesaid, said William B. West also engaged in handling passenger baggage upon the express cars of said defendant company.

6. That on May 15, 1908, at about twelve o'clock, noon, of said day, said William B. West, in the course of his employment as hereinbefore set out, was riding

in one of the express cars of said defendant company, attached to one of the regular trains of said defendant company, being then and there run and operated by said defendant company, over said railroad line in a southerly direction through the State of Oklahoma, which train was one of the regular passenger trains of said defendant, known as "Number Five," and also known as the "Katy Flyer", and that when said train reached a point in said State of Oklahoma, a short distance southerly of the Arkansas River, between the said stations of Verdark and Muskogee, in said State of Oklahoma, said train upon which said William B. West was so riding in the performance of his duties as aforesaid, was by said defendant railroad corporation, through gross carelessness and negligence, upon its part, and while said train was running at a high and dangerous rate of speed, caused and allowed to collide in what is known as a head-end collision with a locomotive and freight train, also owned, maintained and operated by said defendant company, and which freight train was also then and there, through the gross carelessness and negligence of said defendant company, being run and operated by said defendant company upon the same track, in a northerly direction, at a high and dangerous rate of speed, and that said William B. West was, by said collision and by said gross carelessness and negligence on the part of said defendant railroad company, in causing and allowing said trains to be so run and operated upon the same track and to collide as aforesaid, and without any fault or neglect, whatsoever, upon the part of said William B. West, then and there caused to sustain and receive such personal bodily injuries as resulted in his immediate death.

9. That the expectancy of life of said William B. West at the time of his death, according to the Carlisle tables of mortality, was twenty-nine and sixty-four one-hundredths years (29 64/100), and that at the time of his death, as aforesaid, said William B. West was but thirty-eight years of age and in good health of body and mind, and of strong physique and was well able to do great mental and manual labor, and to earn at least the sum of eighty-three and thirty-three one-hundredths dollars ($83 33/100) per month, at his business and employment as express messenger and baggageman as aforesaid, and that at said time was, in fact, actually earning and receiving from his said employment the sum of eighty-three and thirty-three one-hundredths dollars ($83 33/100) per month, and that he would (except for his death so resulting from the neglect of said defendant) have continued to earn and receive a much larger sum per month, for at least the period of twenty-nine years (29) thereafter, and in the aggregate, at least the sum of thirty thousand dollars ($30,000), and that plaintiff herein, and her said children, would have received for their own benefit, out of said moneys that said William B. West would have earned (except for his death as aforesaid) an amount in excess of twenty-five thousand dollars ($25,000) and that plaintiff and her said children have been damaged at the hands of defendant in the loss of the care, aid, advice and society of said William B. West as husband of plaintiff and father of said children in the further sum of at least twenty-five thousand ($25,000) dollars.

Wherefore, plaintiff demands judgment against said defendant in the sum of fifty thousand dollars ($50,000) and for the costs and disbursements of this action" (Rec., pp. 43-47).

DEMURRER.

(Caption and signatures omitted.)

Comes now the defendant and demurs to the plaintiff's petition filed herein and for grounds of demurrer states:

I.

That the plaintiff has no legal capacity to sue for the minor children named in paragraph three of said petition.

II.

That there is a defect of parties plaintiff in this: That the suit is brought in the name of Ivolue B. West as plaintiff while in paragraph four of said petition it is stated that the suit was brought by the plaintiff for the benefit of herself and the minor children named in paragraph three of said petition.

III.

That the petition does not state facts sufficient to constitute a cause of action on behalf of plaintiff (Rec., p. 49).

ORDER OVERRULING DEMURRER.

Thereafter and on the 29th day of October, 1908, the demurrer of the defendant to the plaintiff's petition comes on for hearing before the Court, and after argument of counsel, the Court being fully advised, overrules said demurrer and grants the defendant twenty days in which to answer, to which action of the Court in overruling said demurrer the defendant then and there excepts (Rec., p. 50).

ANSWER.

(Caption and signatures omitted.)

Comes now the defendant and for answer to plaintiff's petition denies each and every material allegation thereof.

Wherefore, having fully answered, defendant prays that it be adjudged to go hence without day with its costs in this behalf laid out and expended (Rec., p. 52).

FIRST AMENDED ANSWER.

(Caption and signatures omitted.)

Comes now the defendant and, by leave of court first had and obtained, for its first amended answer to the petition filed herein denies each and every material allegation thereof.

Further answering defendant states that even if the said William B. West, deceased, was injured and killed at the time, place, and in the manner as alleged in the plaintiff's petition, but no part of which is admitted, but all of which is denied; that his said injuries and death were not due to any negligence on the part of this defendant or any of its agents, servants, or employes, but were due solely to negligence on the part of the said William B. West.

Further answering, defendant states that it is now, and was at all times mentioned in plaintiff's petition, a common carrier by railroad engaged in commerce between the several states, and that the passenger train described by plaintiff in said petition as the "Katy Flyer" was at all times mentioned therein, an interstate train, starting from St. Louis, in the State of Missouri, and passing into and through the State of Kansas, and Oklahoma, and thence into the State of

Texas, and at all times herein mentioned was engaged in the movement of interstate commerce, and defendant further states that the said freight train described in plaintiff's said petition was, on the said 15th day of May, 1908, a train starting from Muskogee, in the State of Oklahoma, and proceeding on its way over the defendant's line of railway to Parsons, in the State of Kansas, and was on said date, and at all times mentioned in plaintiff's petition, engaged in moving interstate commerce.

Wherefore, having fully answered, defendant prays that it be adjudged to go hence without day, with its costs in this behalf laid out, and expended (Rec., p. 55).

REPLY TO FIRST AMENDED ANSWER.

(Caption and signatures omitted.)

Comes now the plaintiff herein and for reply to defendant's first amended answer filed herein denies each and every allegation thereof (Rec., p. 57).

SECOND AMENDED ANSWER.

(Caption and signatures omitted.)

Comes now the defendant and by leave of court first had and obtained, for its second amended answer to the petition filed herein denies each and every material allegation thereof.

Further answering, defendant states that even if the said William B. West, deceased, was injured and killed at the time, place and in the manner as alleged in the plaintiff's petition, but no part of which is admitted, but all of which is denied, that his said injuries and death were not due to any negligence on the part of this defendant or any of its agents, servants, or em-

ployes, but was due solely to negligence on the part of the said William B. West.

Further answering defendant states that it is now and was at all times mentioned in plaintiff's petition, a common carrier by railroad engaged in commerce between the several states, and that the passenger train described by plaintiff in said petition as the "Katy Flyer" was at all times mentioned therein, an interstate train, starting from St. Louis, in the State of Missouri, and passing into and through the State of Kansas and Oklahoma, and thence into the State of Texas, and at all times therein mentioned was engaged in the movement of interstate commerce, and defendant further state that the said freight train described in plaintiff's said petition, was on the said 15th day of May, 1908, a train starting from Muskogee, in the State of Oklahoma, and proceeding on its way over the defendant's line of railway to Parsons, in the State of Kansas, and was on said date, and at at all times mention in plaintiff's petition, engaged in moving interstate commerce.

Further answering defendant states that prior to the time of the alleged injury in question, the said William B. West had made application to the American Express Company in writing for employment by it as driver of one of its wagons at Parsons, Kansas, and was so engaged pursuant to the terms of a written contract, said contract being dated January 9, 1893, a copy of which contract is hereto attached, marked Exhibit "A" and made a part of this answer.

Further answering defendant states that prior to the time of the alleged injury in question, the deceased, William B. West, had made application to the said American Express Company in writing for

employment by it as an express messenger, and that in pursuance of said application he was prior to and at the time of the alleged injury in question employed by the said American Express Company, under a contract in writing between him and said company, which contract was dated October 15, 1896, a copy of which is hereto attached, marked Exhibit "B", and made a part hereof, and which said contract includes as part of its provisions the contract hereinabove referred to and marked Exhibit "A".

Further answering, defendant states that by the terms of said contract hereinabove identified as Exhibit "B", it was provided that in the consideration of the premises and of the employment of deceased, he did assume all risk of accident and injury which he should meet with or sustain in the course of his employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employe of any such corporation or person, or otherwise, and whether resulting in his death or otherwise.

Further answering, defendant states that by the terms of said contract it was provided that in case of any injury suffered by deceased, he would at once, without demand, and at his own expense, execute and deliver to the corporation or person owning or operating the railroad, stage or steamboat line upon which he should be so injured, a good and sufficient release under his hand and seal of all claims, demands and causes of action arising out of such injury or connected with or resulting therefrom.

Further answering, defendant states that by the terms of said contract it was provided that the de-

ceased ratified all agreements theretofore made by said Express Company with any corporation or person operating a railroad, stage and steamboat line in which such express company had agreed in substance, that its employes should have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and deceased further agreed to be bound by each and every part of such agreement, in so far as to provisions thereof relative to injury sustained by employes of the company were concerned as fully as if he were a party thereto.

Further answering, defendant states that by the terms of said contract it was provided that the deceased did thereby authorize and empower said express company at any time while he should remain in its service to contract for him, and in his behalf in its own name or in his name, with any corporations or persons operating a railroad, stage or steamboat line, for his transportation as a messenger or employe, free of charge, upon the condition and consideration that neither he nor his personal representatives, nor any person claiming under him would make any claim for compensation because of any injury sustained by him, whether resulting on (in) the gross negligence of such corporations or persons or of any employes of such corporations or persons, or otherwise, and the contract so made should be as binding and obligatory upon him, as if signed and delivered by him.

Further answering, defendant states that by the terms of said contract it was provided that the deceased did agree that the provisions of said contract should be held to inure to the benefit of any and every corporation and to all persons upon whose railroad, stage or steamboat lines the American Express Com-

pany shall forward merchandise, as fully and completely as if made directly with such corporations or persons.

Further answering, defendant states that by the terms of said contract it was provided that the deceased did agree that in consideration of his employment by said express company that he would assure all risks or accident or injury which he would meet or sustain in the course of such employment, whether occasioned by negligence of said company or any of its members, officers, agents or employes, or otherwise.

Further answering, defendant states that at the time of the alleged injury in question the deceased was in the express car, being transported by this defendant over its said line of railway, and was in said car in pursuance of said contract hereinabove referred to as Exhibit "B", and states that plaintiff is, therefore, now barred from maintaining this action.

Wherefore, having fully answered, defendant prays that it be adjudged and go hence without day, with its costs in this behalf laid out and expended (Rec., pp. 59-62).

(Note.—Exhibits "A" and "B" made a part of the second amended answer are omitted, as they, together with other exhibits, are included in the third amended answer and such portion of these exhibits as is considered necessary for the consideration of the Court will be copied together with the third amended answer.)

REPLY TO SECOND AMENDED ANSWER.

(Caption and signatures omitted.)

The plaintiff for reply to the second amended answer of the defendant in the above-entitled action, de-

nies the said answer and each and every allegation therein contained, save as in her complaint hereinbefore stated, or as hereinafter admitted, stated or qualified:

Plaintiff denies any knowledge or information sufficient to form a belief as to the execution of Exhibits "A" and "B", attached to said answer and made a part thereof.

Further answering, defendant alleges that the said pretended contract, evidenced by Exhibits "A" and "B", purports to be, and if any such instruments were ever signed by William B. West, mentioned in the pleadings, they were so signed and said contract, if it was attempted to be made at all, was attempted to be made in the State of Kansas during the years 1893 and 1896.

That at that time, by virtue of the laws and statutes duly existing in the said State of Kansas, all railroad companies operating within said State of Kansas were liable for all damages done to persons or property if done in consequence of any negligence upon the part of said railroa ompanies and by the laws and statutes of said State, all contracts by which it was attempted to release any railroad company from such damages was void as being in violation of said laws and statutes and of the public policy of the State of Kansas, and that said laws and statutes ever since have and still do exist and are in force in said State of Kansas, and that said contract was wholly without consideration.

That by reason of the existence of said laws and statutes and the want of consideration, aforesaid, the said pretended contract or the evidence thereof purporting to exist in Exhibits "A" and "B" attached to

the answer of the defendant were and are wholly void and of no effect.

Wherefore plaintiff demands judgment as prayed in her complaint (Rec., pp. 89-90).

THIRD AMENDED ANSWER.

Comes now the defendant and by leave of Court first had and obtained, for its third amended answer to the petition filed herein denies each and every material allegation thereof.

Further answering, defendant states that even if the said William B. West, deceased, was injured and killed at the time, place and in the manner as alleged in the plaintiff's petition, but no part of which is admitted, but all of which is denied; that his said injuries and death were not due to any negligence on the part of this defendant or any of its agents, servants, or employes, but was due solely to negligence on the part of the said William B. West.

Further answering, defendant states that it is now and was at all times mentioned in plaintiff's petition, a common carrier by railroad engaged in commerce between the several states, and that the passenger train described by plaintiff in said petition as the "Katy Flyer" was at all times mentioned therein an interstate train, starting from St. Louis, in the State of Missouri, and passing into and through the State of Kansas and Oklahoma, and thence into the State of Texas, and at all times therein mentioned was engaged in the movement of interstate commerce, and defendant further states that the said freight train described in plaintiff's said petition was on the said 15th day of May, 1908, a train starting from Muskogee, in the State of Oklahoma, and proceeding on its way over the defendant's

line of railway to Parsons, in the State of Kansas, and was on said date, and at all times mentioned in plaintiff's petition, engaged in moving interstate commerce.

Further answering, defendant states that prior to the time of the alleged injury in question, the said William B. West had made application to the American Express Company in writing for employment by it as driver of one of its wagons at Parsons, Kansas, and was so engaged pursuant to the terms of a written contract, said contract being dated January 9, 1893, a copy of which contract is hereto attached, marked Exhibit "A" and made a part of this answer.

Further answering, defendant states that prior to the time of the alleged injury in question, the deceased, William B. West, had made application to the said American Express Company in writing for employment by it as an express messenger, and that in pursuance of said application he was prior to and at the time of the alleged injury in question employed by the said American Express Company, under a contract in writing between him and said company, which contract was dated October 15, 1896, a copy of which is hereto attached, marked Exhibit "B", and made a part hereof, and which said contract includes as part of its provisions the contract hereinabove referred to and marked Exhibit "A".

Further answering, defendant states that by the terms of said contract hereinabove identified as Exhibit "B", it was provided that in the consideration of the premises and of the employment of deceased, he did assume all risk of accident and injury which he should meet with or sustain in the course of his employment, whether occasioned or resulting by or from the gross or other negligence of said corporation or person engaged

in any manner in operating any railroad or vessel, or vehicle, or of any employe of any such corporation or person, or otherwise, and whether resulting in his death or otherwise.

Further answering, defendant states that by the terms of said contract it was provided that in case of any injury suffered by deceased, he would at once, without demand, and at his own expense, execute and deliver to the corporation or person owning or operating the railroad, stage or steamboat line upon which he should be so injured, a good and sufficient release under his hand and seal of all claims, demands and causes of action arising out of such injury or connected with or resulting therefrom.

Further answering, defendant states that by the terms of said contract it was provided that the deceased ratified all agreements theretofore made by said express company with any corporation or person operating a railroad, stage and steamboat line in which such express company had agreed in substance that its employes should have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and deceased further agreed to be bound by each and every part of such agreement, in so far as to provisions thereof relative to injury sustained by employes of the company were concerned as fully as if he were a party thereto.

Further answering, defendant states that by the terms of said contract it was provided that the deceased did thereby authorize and empower said express company at any time while he should remain in its service to contract for him, and in his behalf in its own name or in his name, with any corporation or persons operating a railroad, stage or steamboat line, for his

transportation as a messenger or employe, free of charge, upon the condition and consideration that neither he nor his personal representatives, nor any person claiming under him, would make any claim for compensation because of any injury sustained by him, whether resulting on (in) the gross negligence of such corporations or persons or of any employes of such corporations or persons, or otherwise, and the contract so made should be as binding and obligatory upon him as if signed and delivered by him.

Further answering, defendant states that by the terms of said contract it was provided that the deceased did agree that the provisions of said contract should be held to inure to the benefit of any and every corporation and to all persons upon whose railroad, stage or steamboat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons.

Further answering, defendant states that by the terms of said contract it was provided that the deceased did agree that in consideration of his employment by said express company that he would assure all risks or accident or injury which he would meet or sustain in the course of such employment, whether occasioned by negligence of said company or any of its members, officers, agents or employes, or otherwise.

Further answering, defendant states that at the time of the alleged injury in question the deceased was in the express car referred to in plaintiff's petition, being transported by this defendant over its said line of railway from points in the State of Kansas through the State of Oklahoma and into the State of Texas, and was in said car in pursuance of said contract hereinabove

referred to as Exhibit "B", and states that plaintiff is, therefore, now barred from maintaining this action.

Further answering, defendant admits that at and prior to the death of the said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by the defendant railway company over its line of railroad between the City of Parsons, Kansas, through the State of Oklahoma, to points beyond in the State of Texas, and admits that the deceased, William B. West, in addition to his employment as express messenger by the said American Express Company, was also engaged in handling passenger baggage upon the express car of the said defendant railway company, and defendant railway company states that said William B. West, deceased, in performing said duties in handling said baggage, was doing so under and by virtue of his said employment by the said American Express Company, and that such handling of such baggage by said West was for and in behalf of and under the direction of said railway company.

Wherefore, having fully answered, defendant prays that it be adjudged to go hence without day, with its costs in this behalf laid out and expended. (Rec., pp. 93-98.)

(Note—Exhibits A, B and C made a part of the third amended answer are substantially the same, the only portion of these exhibits necessary to be considered is the accident release contract contained therein which forms a part of Exhibit B and will be included in this appendix.)

Accident Release—"Exhibit B".

"Whereas, I, the undersigned, have entered, or am about to enter, the employment of the American Express Company, and in the course of such employment may be required to render services in the care, carriage or handling of merchandise and property in course of transportation by cars, vessels and vehicles belonging to the different railroad, stage and steamboat lines upon which the company relies for its means of forwarding property delivered to it to be forwarded;

"And whereas, such express company, under its contracts with many of the corporations and persons owning or operating such railroad, stage and steamboat lines, is or may be obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employes;

"Now, therefore, in consideration of the premises and of my said employment, I do hereby assume all risks of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employe of any such corporation or person, or otherwise, and whether resulting in my death or otherwise.

"And I do hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made, or may hereafter make, arising out of any claim or recovery upon my part, or the part of my representatives, for damages sustained by reason of my

injury or death, whether such injury or death result from the gross negligence of any person or corporation, or of any employe of any person or corporation. or otherwise.

"And I hereby bind myself, my heirs, executors and administrators with the payment to such express company, upon demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

"I do further agree that in case I shall at any time suffer any such injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning or operating the railroad, stage or steamboat line upon which I shall be so injured. a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury, or connected with or resulting therefrom.

"I do hereby ratify all agreements heretofore made by said express company with any corporation or persons operating any railroad, stage and steamboat line in which such express company has agreed in substance that its employes shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every of such agreements in so far as the provisions thereof relative to injuries sustained by employes of the company are concerned, as fully as if I were a party thereto.

"And I do hereby authorize and empower said express company, at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine, with any corporation or persons operating any railroad, stage or steam-

boat line, for my transportation as a messenger or employe free of charge, upon the condition and consideration that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporations or persons, or of any employe of such corporations or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me.

"And I do hereby further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation, and of all persons upon whose railroad, stage or steamboat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons.

"I do further agree, in consideration of my employment by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said company, or any of its members, officers, agents, or employes, or otherwise; and that in case I shall at any time suffer any such injury, I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury or connected therewith, or resulting therefrom; and I hereby bind myself, my heirs, executors and administrators with the payment to said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

"Witness my hand and seal this 15th day of October, One Thousand Eight Hundred and Ninety-six.

WILLIAM BERDET WEST.

In the presence of
G. C. GATES."
(Rec., pp. 111-115.)

REPLY TO THIRD AMENDED ANSWER.

I.

Plaintiff for her reply to the third amended answer of defendant, save as in her complaint alleged, and as hereinafter alleged, incorporated, admitted or qualified, denies each and every allegation, averment, matter and thing in said third amended answer contained.

II.

Further replying, plaintiff hereby refers to and adopts, repeats and reaffirms each and all of the allegations as set out and alleged in her reply to the second amended answer of said defendant and incorporates the same herein and makes them a part of this reply, in like manner as though they were specifically set out and realleged therein; and plaintiff further specifically denies that the pretended contracts and each of them set out and referred to in defendant's second and third amended answers were valid or in force at the time of the collision set out in plaintiff's complaint, or at any time, and specifically denies that said decedent, William B. West, was at the time of his death or at any other time, working under said pretended contracts, or either of them; and specifically denies that on the day of his death or at any other time he was riding in said car of defendant in pursuance of

said pretended contracts or either of them, or of any written contract as alleged in defendant's second and third amended answers.

III.

Further replying, plaintiff alleges that at the time said contracts and each and both of them were made and ever since the making thereof the statutes of the State of Kansas have provided as follows, to-wit:

"That railroads in this State shall be liable for all damage done to person or property when done in consequence of any neglect on the part of the railroad company."

Wherefore plaintiff demands judgment against said defendant as prayed for in her complaint herein.

IVOLUE B. WEST.

By S. GRANT HARRIS and BENJ. MARTIN,
Attorneys for Plaintiff.

Also as follows, to-wit: "Every railroad company organized and doing business in the State of Kansas shall be liable for all damages done to any employe of said company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employes, to any person sustaining such damage." "Provided, that notice in writing that an injury has been sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within eight months after the occurrence of the injury" (Rec., pp. 126-127).

(Note.—The portion of this reply which appears below signatures of counsel was by leave of Court added by an amendment on the eve of the trial.)

DEMURRER TO PLAINTIFF'S REPLY TO DEFENDANT'S THIRD AMENDED ANSWER.

(Caption and signature omitted.)

Comes now the defendant and demurs to the second paragraph of plaintiff's reply to the defendant's third amended answer for the following reasons, to-wit:

Said paragraph does not state facts sufficient to avoid the allegations of the defendant set up in its third amended answer and relied upon as a defense in this action.

Defendant further demurs to the third paragraph of the plaintiff's reply to the defendant's third amended answer, for the reason that said paragraph does not state facts sufficient to avoid the allegations set up as a defense by the defendant in its third amended answer.

Wherefore the defendant prays judgment of the Court upon its demurrer (Rec., p. 130).

ORDER OVERRULING DEMURRER.

Thereafter and on the 29th day of March, 1910, and during the February, 1910, Term of said Court, the demurrer of the defendant to the plaintiff's reply to the defendant's third amended answer came on for hearing before the Court, and after argument of counsel, the Court being fully advised in the premises, overrules said demurrer, to which action of the Court in overruling said demurrer the defendant then and there excepts (Rec., p. 132).

REJOINDER TO REPLY TO DEFENDANT'S THIRD AMENDED ANSWER.

(Caption and signatures omitted.)

Comes now the defendant and for its rejoinder to the reply of the plaintiff to the third amended answer of the defendant, denies each and every material allegation therein contained (Rec., p. 139).

TESTIMONY OF G. C. GATES AND ALL PROCEEDINGS OF COURT IN CONNECTION THEREWITH.

G. C. Gates, being first duly sworn, testifies as follows on behalf of the defendant:

Direct Examination, by Mr. Allen.

Q. State your name?

A. G. C. Gates.

Q. Have you been sworn, Mr. Gates?

A. Yes, sir.

Q. Where do you live at this time?

A. Dallas, Texas.

Q. What was your employment, Mr. Gates, during the month of October, 1906; I don't mean 1906, I mean 1896?

A. I was road agent American Express Company at that time.

Q. Were you acquainted with the person who was an express messenger on the train known as William B. West, in his lifetime?

A. Yes, sir.

Q. I show you an American Express Company's application for situation of William Burdett West, and ask you if you are acquainted with that paper?

A. Yes, sir.

Q. Does that paper bear your signature, Mr. Gates?

A. Yes, sir.

Q. Does it bear the signature of Mr. West?

Mr. Taylor: That is objected to as incompetent, irrelevant and immaterial, and if it is what I assume it is, it seems to me it might be well to excuse the jury on this argument because I propose to keep these papers out of the record, if possible, and I don't think they are admissible and before we get them in the record I want to dispose of that question.

By the Court: Well, it is now near 12 o'clock, so we will dispose of that question before noon.

Thereupon the Court admonished the jury, permitted them to separate and ordered them to return into Court at 1:30 p. m.

Mr. Taylor: As far as the signature is concerned, at the proper time we are willing to admit that it is his signature, if the papers have any bearing in the case at all. The paper which is shown the witness and which counsel, I understand, propose to make an exhibit in the case, is objected to on the ground that it is not pleaded, and on the further ground that it is incompetent, irrelevant and immaterial, and shows on its face that it is void under the laws of the State of Kansas, where is was made, as also appears upon the face of the papers, and on the further ground that it is a paper purporting to be an application and agreement made between the plaintiff in this action and a person not a party to this action and having no connection with it, and a paper which the defendant in this action has not signed, and upon which the defendant is in no way bound. The grounds with respect to its being void under the statutes of the State of Kansas, where it was made, of course, is purely a mat-

ter of law, and it may be we had better argue that at this time, but I think the other objections are perfectly good to it, so I suppose we might as well take that up first.

By the Court: Is not that one of the contracts pleaded?

Mr. Taylor: I think not, but they have two others here. We make the same objection the (to) the three papers presented.

Mr. Ralls: We expect to show in this connection that the deceased made these applications for employment upon the terms expressed in the application, and that he was employed according to those terms and was acting as such employe under the terms of these applications at the time he received the injury, and that in this application he had stipulated and agreed that the American Express Company might, for him, go into a contract releasing any railroad company from liability on account of injuries in the words as set out in the accident release clause contained in the application. And we expect to follow that up by showing that the American Express Company did enter into a contract releasing the M., K. & T. Railroad Company from liability for any of the accidents provided for in this application; and that the accident which caused his death was one that was covered by the provisions of this application, and that it released the M., K. & T. Railroad Company from any liability on account of the death of West, and the witness we had on the witness stand was to show the signature of West, and to show further that he was employed and worked under the terms of these contracts.

Mr. Taylor: Of course it is denied he was working under these contracts. I will ask the reporter to enter

right here the further objection that the contracts and matters which counsel has referred to as being made between the defendant railroad company and the American Express Company are not pleaded as set out and could not possibly bind the plaintiff in this action; they are immaterial.

Whereupon, the hour of noon having arrived, court took a recess until 1:30 p. m.

AFTERNOON SESSION.

Thereupon the following proceedings were had in the presence of the jury:

Mr. Allen: We now offer in evidence the application for situation of William B. West, Parsons, Kansas, for the position of messenger, dated October 18, 1896, the signature of Mr. West having been admitted by counsel for the plaintiff, which document includes the accident release over the signature of Mr. West, as "Defendant's Exhibit A".

Mr. Allen: The defendant now offers in evidence the application for situation of W. B. West, the deceased, for the position of driver, bearing date of January 9, 1893, and the line being erased there with February 1st inserted above, it being admitted by the plaintiff that the signature of W. B. West appended to the application is the signature of the deceased W. B. West, which application also includes a release accident clause over said signature, as "Defendant's Exhibit B".

Mr. Allen: Defendant now offers in evidence the application for situation of William B. West of Parsons, Kansas, as driver, dated October 18, 1983 (1893), the signature of said William B. West, or W. B. West, being admitted by the plaintiff, which document also includes accident release. In connection with this ap-

plication I will say it has not been pleaded in our answers in this case for the reason that at the time of the preparation of the answer counsel for defendant had not been supplied with the release and we now ask leave to amend our third amended answer to show the execution of this release and our reliance upon this defense in the same manner as the other releases have been pleaded. We ask the exhibit by marked "Defendant's Exhibit C".

Mr. Taylor: Plaintiff objects to the offer of Exhibits "A", "B" and "C" on the ground that they, and the papers and contracts referred to in them, have not been pleaded, and that since they are incomplete, and on the further ground that they are incompetent, irrelevant and immaterial, and show on their face that they refer to other employment than that in which plaintiff was engaged at the time of this accident, and on the ground that upon their face they are outlawed and barred by the statute, and on the further ground that the plaintiff at the time of this accident was not engaged in any employment referred to or contemplated in the instrument, and on the further ground that the instruments and all three of them are shown on their face to be contracts of the State of Kansas and made therein, and that they are void absolutely under the laws of the State of Kansas, wherein they were made, and under the decisions of that State, and in connection with the last of these objections plaintiff offers the statutes in evidence of the State of Kansas, which were pleaded in the reply to defendant's second and third amended answers.

Mr. Ralls: The defendant objects to the introduction of the Kansas statute referred to on the ground it is incompetent, irrelevant, immaterial and inadmis-

sible. I am not objecting to the form he is offering it, but to the statute itself.

By the Court: Objection overruled.

Mr. Ralls: The defendant excepts.

Mr. Taylor: The section referred to which the plaintiff introduces in evidence are those contained in the General Statutes of Kansas of 1905, on page 1257, being sections Nos. 6311 and 6312.

Section 6311 reading:

> "Liable for damages. That railroads in this State shall be liable for all damages done to person or property, when done in consequence of any neglect on the part of the railroad companies" (L. 1870, Ch. 93).

Section 6312 reading:

> "To employe. 22. Every railroad company organized or doing business in the State of Kansas shall be liable for all damages done to any employe of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes, to any person sustaining such damages: Provided, That notice in writing that an injury has been sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within eight months after the occurrence of the injury."

There is something further in that section, but nothing that relates to this case, so I will merely introduce that portion of that section unless counsel wants me to read it all.

Mr. Ralls: We will offer evidence to show that the deceased was working under this particular contract

at the time he was injured; that this contract was broad enough and did cover the employment while he was in the employ of the American Express Company.

By the Court: It has always been a question with this Court as to how far things ought to go with reference to public policy; it is a pretty broad question. This Kansas statute is plain concerning the actions of railroads in paying damages, etc. I am of the opinion, gentlemen, from what I have read and the argument here, that these contracts are void. You can make your offer to prove them and get them in the record and we will go on. I will so hold that the contracts are invalid; my reason for sustaining the objection is under the Kansas statute.

Mr. Ralls: The defendant excepts to the ruling of the Court.

Mr. Ralls: We now offer to prove by this witness that the decedent, Mr. West, was, at the time of the accident which resulted in his death, working for the American Express Company under the contracts of employment that have been offered in evidence heretofore.

Mr. Taylor: We desire to make the same objection to this offer of counsel as those made to the offer to introduce the exhibits.

By the Court: Objection sustained.

Mr. Ralls: The defendant excepts.

Mr. Ralls: I presume the objection is sustained on the theory that the contracts are void?

By the Court: Yes.

Mr. Ralls: The defendant excepts.

Q. That is all with this witness.

(Witness excused) (Rec., pp. 206-213).

TESTIMONY OF F. D. ADAMS AND ALL PROCEEDINGS OF COURT IN CONNECTION THEREWITH.

F. D. Adams, being first duly sworn, testified as follows on behalf of the defendant:

Direct Examination, by Mr. Allen.

Q. State your name?

A. F. D. Adams.

Q. Have you been sworn as a witness, Mr. Adams?

A. Well, I was sworn yesterday; yes, sir.

Q. What is your business, Mr. Adams?

A. At present time, general superintendent of the Southern Division of the American Express Company.

Q. Did you know Mr. West in his lifetime?

A. Yes, sir.

Q. Did you know of the—at the time of his death, or do you know the time of his death?

A. I didn't understand your question.

Q. Did you know at what time he met his death?

A. Yes, sir; May 15, 1908.

Q. At that time do you know what relation existed between Mr. West and the M., K. & T. Railroad Company with reference to handling baggage of that company?

A. Yes, sir.

Q. What was that relation, Mr. Adams?

Mr. Taylor: I would like to ask first if there was anything in writing, any written agreement.

By the Court: Don't you plead Mr. Taylor he also handled passenger baggage?

Mr. Taylor: Yes, sir; we plead it.

Mr. Allen: We expect to go further by this witness.

By the Court: All right; go ahead and ask the question.

Mr. Taylor: Is there a written contract regarding it?

Witness: I don't exactly understand what you refer to as a written contract.

Mr. Taylor: He asked you what the relation was between the two and I want to know if it was expressed by any written agreement?

Witness: I couldn't say that there was.

Q. Now, what was that relation, Mr. Adams?

Mr. Taylor: That is objected to as incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

Mr. Taylor: The plaintiff excepts.

A. Well, he was a joint messenger and baggage man.

Q. By joint you mean joint with the M., K. & T. and the Express Company?

A. Worked for both companies; yes, sir.

Q. Do you know what proportion of his salary was paid by those companies, or whether it was paid in any proportion?

A. Equal division.

By Mr. Taylor (Q.): Was this in writing, any of it, relating to the salary as between the Railroad Company and the Express Company; if it is in writing, this is not the best evidence?

Mr. Ralls: We offer this for the purpose of showing that the deceased was a joint employe of the American Express Company and the M., K. & T. Railroad Company, while he was running as messenger on the line.

Mr. Taylor: If this agreement was in writing it is the best evidence; I don't see why we are bound by any agreement between these two companies.

By the Court: If the agreement was not in writing he can answer the question.

Mr. Taylor: The plaintiff excepts.

By Mr. Allen (Q.): Have you got a copy of a notice among your files or in your possession directed to the various messengers of the American Express Company as to their duties with reference to the baggage of the Missouri, Kansas & Texas Railroad Company?

A. I have a copy of a general circular issued to them.

Q. Have you it with you?

A. Yes, sir.

Q. Produce it, please, sir?

A. Here is a copy.

Q. By whom was this circular issued, Mr. Adams?

A. It was issued by myself.

Q. In what capacity?

A. As superintendent.

Q. It is directed to joint messengers and baggage men; it appears to be on the M., K. & T. line; that means joint messengers of what?

A. Joint messengers; we call or term these men messengers, and the railroad baggage men, and the word joint signifies they worked for both companies.

Q. Does that include the position which Mr. West occupied?

A. Yes, sir.

Mr. Taylor: That is objected to as calling for a conclusion and incompetent, irrelevant and immaterial, and we ask that it be stricken.

By the Court: Objection sustained; the answer will be stricken.

Mr. Allen: We offer in evidence the paper identified by the witness, being a copy of instructions to joint

messengers and baggage men on the M., K. & T. lines as "Defendant's Exhibit D".

Mr. Taylor: It is objected to on the ground that it is incompetent, irrelevant and immaterial, and not the best evidence, and that the recitals therein contained are not shown to have ever been brought to the attention of the plaintiff in this action, and that the recitals themselves have no support in the evidence to sustain them.

Mr. Allen: I expect to show further how it was transmitted and delivered, and how it reached these messengers, and how their attention was called to it.

By the Court: If there is something in writing about the joint payment, I think it would be better than what you are offering there. Objection sustained.

Mr. Allen: The defendant excepts.

Mr. Allen: Now I take it that the Court has sustained this objection because it has not been sufficiently identified.

By the Court: Well, it is simply just what he might have told this deceased, William B. West.

Mr. Allen: We offer to show by Mr. Adams that at the time Mr. West went into the service as messenger he understood that it was his, West's, duties to perform joint services for the Railway Company and the Express Company.

Mr. Taylor: Further than the matters offered to be shown and admitted by the pleadings, we object to the offer as incompetent, irrelevant and immaterial.

By the Court: I think I will let him answer the question; objection overruled.

Mr. Taylor: The plaintiff excepts.

Q. What were Mr. West's duties with respect to the

Railway Company as to handling the baggage, Mr. Adams?

A. Received the baggage at the stations, made a record of it, and put it off at its destination in the same manner any baggage man did.

Q. Do you know what runs he had at the time of his death?

A. He was running between Parsons, Kansas, and Dallas, Texas.

Q. Do you know whether, under such runs as that, he handled shipments of express from points in the State of Kansas to points in other States, for instance, Oklahoma or Texas?

Mr. Taylor: That is objected to as incompetent, irrelevant and immaterial, but we will admit that he handled express and baggage matter between local points in each State and also between points in one State and points in another State

By the Court: Answer the question, then.

Mr. Allen: That is all I wanted to prove by him.

Q. Do you know whether Mr. West, at the time he was employed as messenger, knew that he was to handle the baggage of the railroad company and act as joint employe of the Railroad Company and the Express Company?

Mr. Taylor: As to his opinion as to what Mr. West knew at that time we object as incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

Mr. Taylor: The plaintiff excepts.

Q. (Question read by stenographer.)

A. He did, and was told to post himself in the work of both companies.

Q. Do you know, Mr. Adams, whether or not that

train upon which Mr. West was messenger carried interstate baggage, or baggage from points in one State to points in another State?

A. I would not be able to say upon that particular occasion; I could state as to express.

Q. That is all.

Cross-Examination, by Mr. Taylor.

Q. Who paid Mr. West?

A. He drew his money from the Express Company.

Q. All of his salary came from the Express Company?

A. Yes, sir.

Q. And for any work he done for them in handling baggage the Railroad Company would pay over to the Express Company?

A. They paid us one-half of his salary; we draw a bill against them in his name and the other baggage men.

Q. That is all.

(Witness excused) (Rec., pp. 213-219).

Defendant's Exhibit D.

"St. Louis, Mo., July 21st, 1897.

"*To Joint Messengers & Baggagemen,*

"*On M., K. & T. Lines.*

"GENTLEMEN:

"In some instances I find there has been considerable controversy between messengers and train crews on joint runs in regard to your duties to the railroad company. Inasmuch as the railroad company pay a portion of your salary you are just as much an employe of the railroad on which you run as you are of the express company, and you must be just as careful of your interests

as you are of this company and perform your duties to that company, as near as possible, in the same manner that they would be performed by exclusive baggagemen. In the event of any controversy between yourself and flagman, or porters, you should refer the matter to the conductor and carry out his instructions.

"There has been some difficulty in regard to the handling of train boxes in baggage cars, some messengers insisting that there was not room in the baggage end of the car and they should be carried on the platform. It does not matter where the space in your car is, in the express or baggage end, if there is room in the car anywhere the box should be carried there, if requested to do so by the train men.

"There is no reason why the joint business cannot be handled successfully and in harmony with the train crews, and I want you to take up with the trainmaster of your division or the general baggage agent, any matter of interest of the railroad company. Any difficulties between yourself and train men can, and unquestionably will, be settled by the conductor in charge of the train, if appealed to. There is no disposition on the part of either company, in whose service you are, to impose upon you duties that you cannot perform, and I know very well that the superintendents and trainmasters of the railroad company will sustain you where it is shown that you are endeavoring to perform your duties satisfactorily.

"There has been no serious complaint, but it must be understood that the instructions of the railroad company are to be complied with, where the same do not conflict with the standing rules of

this company in regard to the care of money and valuables.

Yours truly,
(Signed) F. D. ADAMS,
Superintendent."
(Rec., p. 277.)

TESTIMONY OF C. R. DAIGH ON BEHALF OF RAILWAY COMPANY.

C. R. Daigh, being first duly sworn, testified as follows on behalf of the defendant:

Direct Examination, by Mr. Ralls.

Q. State your name.

A. C. R. Daigh.

Q. Mr. Daigh, you are the same witness who testified here yesterday, are you not?

A. Yes, sir.

Q. And what is the name of the engineer pulling your train that collided with No. 5?

A. Lannihan.

Q. How long had he been pulling a freight train between Parsons and Muskogee?

A. I couldn't say exactly, a couple of years, I guess; maybe longer.

Q. Do you know how long he had been an engineer on that line?

A. No, sir; I couldn't say.

Q. And how long had you been a conductor, you say?

A. About six years.

Q. And you were well acquainted with Mr. Lannihan, were you?

A. Yes, sir.

Q. You saw him just before you started out of Muskogee that day, did you?

A. Yes, sir.

Q. I believe you stated yesterday he had the same kind of an order you had?

A. Yes, sir.

Q. Now, how was it that you and Mr. Lannihan happened to start out of here in violation of that order?

Mr. Taylor: We object as incompetent, irrelevant and immaterial.

Mr. Ralls: We offer to show by this witness this wreck was not caused by any gross negligence on the part of the engineer or the conductor.

By the Court: Show what was done; let him answer.

A. It was a miscalculation of time.

Q. In what way, Mr. Daigh?

Mr. Taylor: We object as incompetent, irrelevant and immaterial.

By the Court: Let him state what was done; objection sustained.

Q. Just explain, then, to the jury how the mistake occurred.

A. Well, to No. 5's time——

Mr. Taylor: We object as incompetent, irrelevant and immaterial.

By the Court: Let him state; go ahead.

Mr. Taylor: The plaintiff excepts.

A. No. 5's time and all of the rest of the trains I was to meet was miscalculated just an hour.

Q. By who?

A. By myself.

Q. It was a matter of calculation, then?

A. Yes.

Q. How long had you been on this particular run as conductor?

A. You mean this division?

Q. Yes.

A. I had been down here about a couple of months, I suppose.

Q. State whether or not you knew the schedule time of this flyer known as No. 5 at that time.

Mr. Taylor: We object as incompetent irrelevant and immaterial.

By the Court: Objection overruled.

Mr. Taylor: The plaintiff excepts.

A. Yes, sir.

Q. Now, then, explain to the jury how it was, if you can, that this miscalculation was made; in what way?

Mr. Taylor: We object as incompetent, irrelevant and immaterial.

By the Court: Objection sustained.

Mr. Ralls: We offer to show by the witness that it was an oversight and not intentional on his part that the miscalculation was made.

Mr. Taylor: We object as incompetent, irrelevant and immaterial.

By the Court: Objection sustained.

Mr. Ralls: The defendant excepts.

Q. Mr. Daigh, your train was going from Muskogee to what point?

A. Parsons, Kansas.

Q. State whether or not you were carrying loads from Muskogee to Parsons, Kansas, or other point beyond there.

Mr. Taylor: That is objected to on the grounds that fact as respect to both trains have been admitted.

By the Court: Objection overruled; let him answer.

Mr. Taylor: The plaintiff excepts.

(Question read by stenographer.)

A. Yes, sir.

Q. I ask you to state to the jury whether or not the oversight on this miscalculation of the time was willfully done by you or not?

Mr. Taylor: We object as incompetent, irrelevant and immaterial, and calling for a conclusion.

By the Court: Objection sustained.

Mr. Ralls: The defendant excepts.

A. That is all.

Mr. Taylor: No questions.

Witness excused. (Rec., pp. 243-246.)

TESTIMONY OF G. H. BOWERS.

G. H. Bowers, being first duly sworn, testified as follows on behalf of the defendant.

Direct Examination, by Mr. Allen.

Q. State your name.

A. G. H. Bowers.

Q. What is your business, Mr. Bowers?

A. General baggage agent for the M., K. & T.

Q. What was your business during the month of May, 1908?

A. Same business.

Q. Do you recollect the collision between train No. 5 and the freight train near Muskogee on the 15th day of that month?

A. Yes, sir.

Q. Did you know the express and baggage men on that train, Mr. West?

A. Very well.

Q. Do you know whether or not Mr. West was handling any baggage for the M., K. & T. on that road that day?

A. Yes, sir.

Q. Do you know whether he had any baggage that was destined for some point in one State to a point in another State; that is, baggage which passed over the State line?

A. He had baggage from Chetopa, Kansas, to Broken Arrow, Oklahoma; he had baggage from New York for Dallas, Texas, some 10 or 12 pieces; I recollect one lot of two pieces from Shreveport, Illinois, to Muskogee, Oklahoma.

Q. That is all.

Cross-Examination, by Mr Taylor.

Q. Did he also have baggage between local points in Oklahoma?

A. I think he had some in Vinita; I got records from the agents of what they shipped on that train.

Q. Did he also have baggage from local points in Kansas?

A. I didn't look that up; I only looked up the baggage he received after he left Parsons.

Q. I mean he did carry baggage between local points?

A. That train usually did.

Q. That is all.

Witness excused. (Rec., pp. 246-247.)

INSTRUCTIONS REQUESTED BY DEFENDANT AND REFUSED.

1.

The Court instructs the jury to find the issues in favor of the defendant.

2.

If you find from the evidence in this case that the deceased, W. M. West, was not an employe of the defendant, then the defendant would not be liable unless you should further find that the defendant was guilty of gross negligence and that as a result of such negligence the deceased was killed.

3.

If you find from the evidence in this cause that the said W. B. West was employed by the defendant as baggage master and was acting as such at the time of his death, you will find the issues in favor of the defendant.

4.

If you find from the evidence in this cause that the deceased, W. B. West, was an employe of the defendant, at the time he received the injuries which caused his death, and that as such employe he was engaged in interstate commerce as hereafter explained, then the laws of the United States would govern the liability of the defendant herein.

5.

If you find from the evidence in this action that the defendant, W. B. West, at the time he received the injuries which caused his death was not an employe of

the defendant, and if you further find that the deceased W. B. West entered into the contract introduced in evidence stipulating for a release of the defendant, then your verdict should be for the defendant.

7.

If you should find for the plaintiff your verdict should be for such amount as would compensate the plaintiff for the financial loss sustained and you are not to permit your sympathy to influence your verdict. The plaintiff is not entitled to recover for loss of the society of deceased nor for mental anguish. Your verdict must be based upon the financial loss in dollars and cents.

8.

If you find for the plaintiff your verdict must not exceed ten thousand dollars.

6.

If you find from the evidence that the train upon which West was working was at the time of his death engaged in commerce between the States and that he was an employe of the defendant, the plaintiff is not entitled to recover." (Rec., pp. 281-284.)

(Note: The exceptions of the plaintiff in error, Railway Company, to the refusal of the Court to give these requested instructions as appearing in the record are omitted.)

CHARGE OF THE COURT.

1.

Gentlemen of the Jury:

You are instructed that this action is brought by the plaintiff as the widow of William B. West for the benefit of herself as such widow and of the minor children

of herself and of said William B. West, deceased, for the alleged negligent killing of her husband while he was running upon one of the defendant's trains as an express messenger in the employ of the American Express Company.

Plaintiff alleges that at and prior to the time of the death of said William B. West he was employed by the American Express as a messenger, upon the express cars operated by the defendant company over its line of railroad between Parsons, Kansas, through the State of Oklahoma to points beyond in the State of Texas. That in addition to his duties as express messenger said West was also engaged in handling passenger baggage upon the express cars of the defendant company. That on May 15, 1908, at about 12 o'clock noon of said day, said William B. West, in the course of his employment, was riding in one of the express cars of the defendant company, then being operated by defendant over its railroad in a southerly direction through the State of Oklahoma upon its train known as the "Katy Flyer". That when said train reached a short distance south of the Arkansas River between the stations of Verdark and Muskogee, said train, through gross craelessness and negligence upon the part of the railroad company, and while said train was running at a high and dangerous rate of speed, caused and allowed to collide in a head-end collision with a locomotive and freight train, also owned, maintained and operated by said defendant company, and which freight train was also through the gross carelessness and negligence of said defendant company being run and operated by said defendant company upon the same track, in a northerly direction, at a high and dangerous rate of speed; and that the said William B. West was by said

collision and by the gross carelessness and negligence on the part of the defendant and without any fault or neglect upon his part was then and there caused to sustain and receive personal injuries which resulted in his immediate death. Plaintiff brings suit in the sum of $50,000.00 for said killing.

The defendant has filed an answer which after denying each and every material allegation in plaintiff's petition avers that if the said William B. West was injured and killed at the time, place and in the manner alleged his death was not due to any negligence on the part of the defendant or any of its servants, agents or employes, but was due solely to the negligence on the part of the said William B. West. Defendant further alleges in its answer that the defendant before entering into the service of this company had executed two certain contracts to the American Express Company by which claims for damages for injuries were waived and released and in which contract he agreed to release any railroad on which he might be working at the time of any injury, and that the plaintiff is now barred from maintaining this action.

2.

You are further instructed that the jury are the sole judges of the weight of the testimony and credibility of the witnesses, but the law of the case is that which is given to you by the Court in these instructions, and you are to be governed by no other law. In determining the weight of the testimony and credibility of the witnesses you have the right to look to each witness as he conducted himself while upon the witness stand, to his fairness or lack of fairness, to his intelligence or his incapacity as the same appeared to you, to his in-

terest in the case, if any, and you have the right to look to each and every surrounding circumstance that appears in the testimony. If there is a conflict between the different parts of the testimony of any witness it is your duty to reconcile the same, if this can be done, upon the theory that each witness has spoken the truth; but if this cannot be done then you may disregard any part of the testimony of any witness, or all of his testimony, as you may see fit under the surrounding facts and evidence in the case. If you believe from the evidence that any witness has willfully testified falsely to any fact material to the issue in this case, then you are at liberty to disregard any part or the whole of the testimony of such witness.

3.

The burden is upon the plaintiff to sustain her contention by a preponderance of the testimony. By this is meant by the greater weight of the testimony, and not necessarily the number of witnesses testifying upon the one side or the other.

4.

You are instructed that it is the duty of a railway company to so conduct, maintain and run its trains used in its business in such a manner as to prevent injury to persons riding on said trains.

4½.

By "ordinary care" as that term is used in these instructions, is meant that degree of care which a person of reasonable prudence and caution would likely use and exercise under the same or similar circumstances and conditions, and a failure to use such care is negligence on the part of the person or corporation guilty

of such failure. That is to say, negligence is the failure to do or perform some act or the doing of some act which, from the nature of the act and under the circumstances, may result in injury or damage to the person or property of others, and which a person of reasonable prudence would or would not do, as the case may be, under the same or similar circumstances, and the rule here stated applies equally to persons and corporations, the latter, that is, corporations, being chargeable with the negligence, if any, committed by their officers, agents and employes in the discharge of their duty as such.

5.

Now bearing in mind these instructions and applying them carefully to the evidence before you, if you believe and find from a preponderance of the testimony that on or about the 15th day of May, 1908, in the County of Muskogee, William B. West was personally injured by being in a wreck caused by a collision between the "Katy Flyer" and one of defendant's freight trains on its line of railroad south of the Arkansas River Bridge, and you further find that such injury was the direct or proximate result of the negligence of the defendant, its agents, officers or employes to properly conduct and run its trains on said railroad track; that is, if you so find and believe that the injury sustained by William B. West was the direct or proximate result of the failure of defendant, its officers, agents or employes to exercise that degree of diligence and care to prevent injury to others as a person of ordinary caution and prudence would likely have used under the same or similar circumstances, and you further find that such injury caused the death of the said William B. West, then it will be your duty to return a

verdict in favor of the plaintiff herein for such sum, as, in your judgment, the evidence shows her to be entitled to under other instructions given you in this case.

6.

If you find for the plaintiff in this case, then in assessing the damages which she is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the widow and children of the deceased, and, determining this, you may consider the probable earnings of the deceased, his age, experience, habits, health, and bodily qualifications, during what probably would have been his life time if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition.

7.

Nine of the jury concurring is sufficient to return a verdict for plaintiff or defendant, and if the verdict is rendered by nine or more, but by less than the whole number of jurors, then the jurors who concur in the verdict must sign their names thereto. If the verdict is concurred in by the entire jury, then you will select some one of your number foreman and have him sign the verdict as such foreman and return it into court (Rec., pp. 287-294).

(Note.—The exceptions of the plaintiff in error, Railway Company, to the giving of these instructions by the Court as appearing in the record are omitted.)

MOTION FOR NEW TRIAL.

(Caption and signatures omitted.)

Comes now the defendant in the above-entitled cause, and by its attorneys, and moves this Honorable Court for a new trial, and prays that it be granted a new trial for the following causes, each and all of which materially affect its substantial rights:

I.

For the reason that the damages awarded by the jury were excessive and appear to have been given under the influence of passion and prejudice, and in support of this assignment of error defendant alleges that the jury did not deliberate upon their verdict to exceed twenty minutes, and after retiring to their jury room to deliberate upon their verdict returned their verdict into court within twenty minutes after the case had been submitted to them for deliberation; and defendant asserts that it was impossible within the short time above stated for them to consider the evidence in the case, and that the evidence in the case was not considered by the jury.

II.

For the reason that the verdict of the jury is not sustained by sufficient evidence.

III.

For the reason that the verdict of the jury is without evidence to support it.

IV.

For the reason that the verdict of the jury is contrary to law.

V.

For errors at law occurring at the trial and excepted to by the defendant.

VI.

That the Court erred in refusing to give to the jury at the request of the defendant the written instruction requested by it, and numbered 1, to which refusal of the Court the defendant then and there objected and excepted and still objects and excepts, said instruction No. 1, requested being as follows: (Requested instruction No. 1 is herein quoted in full.)

VII.

That the Court erred in refusing to give to the jury at the request of the defendant the written instruction requested by it, and numbered 2, to which refusal of the Court the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 2, requested being as follows: (Requested instruction No. 2 is herein quoted in full.)

VIII.

That the Court erred in refusing to give to the jury at the request of the defendant the written instruction requested by it, and numbered 3, to which refusal of the Court the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 3, requested being as follows: (Requested instruction No. 3 is herein quoted in full.)

IX.

That the Court erred in refusing to give to the jury at the request of the defendant the written instruction requested by it, and numbered 4, to which refusal of

the Court the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 4 requested being as follows: (Requested instruction No. 4 is herein quoted in full.)

X.

That the Court erred in refusing to give to the jury at the request of the defendant the written instruction requested by it, and numbered 5, to which refusal of the Court the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 5 requested being as follows: (Requested instruction No. 5 is herein quoted in full.)

XI.

That the Court erred in refusing to give to the jury at the request of the defendant the written instruction requested by it, and numbered 6, to which refusal of the Court the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 6 requested being as follows: (Requested instruction No. 6 is herein quoted in full.)

XII.

That the Court erred in refusing to give to the jury at the request of the defendant the written instruction requested by it, and numbered 7, to which refusal of the Court the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 7 requested being as follows: (Requested instruction No. 7 is herein quoted in full.)

XIII.

That the Court erred in refusing to give to the jury at the request of the defendant the written instruction

requested by it, and numbered 8, to which refusal of the Court the defendant then and there objected and excepted, and still objects and excepts, said instruction 8 requested being as follows: (Requested instruction No. 8 is herein quoted in full.)

XIV.

The Court erred in instructing the jury in accordance with its instructions, numbered 1, which was given to the jury, to the giving of which instruction the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 1 being as follows: (Instruction No. 1 is herein quoted in full.)

XV.

That the Court erred in instructing the jury in accordance with its instruction, numbered 2, which was given to the jury, to the giving of which instruction the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 2 being as follows: (Instruction No. 2 is herein quoted in full.)

XVI.

That the Court erred in instructing the jury in accordance with its instruction, numbered 3, which was given to the jury, to the giving of which instruction the defendant then and there objected and excepted, and still objects and excepts: (Instruction No. 3 is herein quoted in full.)

XVII.

That the Court erred in instructing the jury in accordance with its instruction, numbered 4, which was given to the jury, to the giving of which instruction

the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 4 being as follows: (Instruction No. 4 is herein quoted in full.)

XVIII.

That the Court erred in instructing the jury in accordance with its instruction numbered 4½, which was given to the jury, to the giving of which instruction the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 4½ being as follows: (Instruction No. 4½ is herein quoted in full.)

XIX.

That the Court erred in instructing the jury in accordance with its instruction numbered 6, which was given to the jury, to the giving of which instruction the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 5 being as follows: (Instruction No. 5 is herein quoted in full.)

XX.

That the Court erred in instructing the jury in accordance with its instruction, numbered , which was given to the jury, to the giving of which instruction the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 6 being as follows: (Instruction No. 6 is herein quoted in full.)

XXI.

That the Court erred in instructing the jury in accordance with its instruction, numbered 7, which was given to the jury, to the giving of which instruction the defendant then and there objected and excepted,

and still objects and excepts, said instruction No. 7 being as follows: (Instruction No. 7 is herein quoted in full.)

XXII.

That the Court erred in the admission of evidence offered by the plaintiff, to which action of the Court the defendant objected and excepted at the time and still objects and excepts.

XXIII.

That the Court erred in the exclusion of evidence offered by the defendant, to which action of the Court the defendant excepted at the time and still excepts.

The defendant states each and all of the errors of the Court, as herein alleged, were prejudicial to its rights and prevented it from having a fair trial.

Wherefore, defendant prays that the verdict therein rendered be vacated, and that a new trial be granted it, and that it have all further and proper relief to which it may be entitled" (Rec., pp. 299-311).

(Note.—The charge of the Court and the several instructions requested by the Railway Company are copied in this motion as it appears in the record, but inasmuch as they appear elsewhere in this appendix, they have been omitted from the motion as herein contained.)

APPLICATION AND PETITION FOR REHEARING.

(Caption and signatures omitted.)

Now, on this day comes the Missouri, Kansas & Texas Railway Company, plaintiff in error, and respectfully petitions this Honorable Court for a rehearing of this case, and for grounds of such petition, respectfully states that questions decisive of this case

and duly submitted by counsel have been overlooked by the Court in the decision rendered herein, and that said decision is in conflict with controlling decisions of this Court, and of its predecessor, the Supreme Court of the Territory of Oklahoma; and, also, the Supreme Court of the United States, to which the attention of the Court was not called, either in the brief or oral argument, and which have been overlooked by the Court.

Counsel for plaintiff in error respectfully assert:

I.

That this Court, in its opinion and judgment herein, misunderstood the pleadings.

II.

That this Court, in its opinion and judgment herein, misunderstood the evidence.

III.

That this cause was tried on the theory that the issue was made by the pleadings that the deceased, William B. West, was an employe of the plaintiff in error, Railway Company, and that the evidence at the trial showed that he was such an employe, and under decisions controlling upon this Court, to which the attention of this Court was not called, either in brief or in oral argument, this case must be decided by this Court upon that theory.

IV.

Plaintiff in error did not waive its exceptions to the action of the trial court in sustaining the objections of the defendant in error to the evidence offered by the plaintiff in error, which evidence was corroborative of

the evidence of the plaintiff in error establishing that the deceased, William B. West, was an employe of the plaintiff in error, for the reason that the parties, by their pleadings and in the trial of the case, had assumed as an established fact that the said William B. West, at the time of the accident, was an employe of the plaintiff in error, and by reason of being such an employe, had the right to be upon the train at the time of the injury, which said evidence referred to by the Supreme Court of the State of Oklahoma is a certain written communication dated July 21st, 1897, transmitted by F. D. Adams, as general superintendent of the American Express Company, to the said William B. West, reminding him that he was an employe of the plaintiff in error, Railway Company, as well as the American Express Company, in the performance of the duties which were the identical duties referred to in the defendant in error's petition in this cause, and which written communication, so far as applicable to the question, is in words and figures as follows:

> "In some instances, I find there has been considerable controversy between messengers and train crews on joint runs in regard to your duties to the Railroad Company. Inasmuch as the Railroad Company pay a portion of your salary, you are just as much an employe of the railroad on which you run as you are of the Express Company, and you must be just as careful of their interests as you are of this company, and perform your duties to that company, as near as possible, in the same manner that they would be performed by exclusive baggagemen."

V.

The Supreme Court of the United States has definitely decided that this action must be brought by the personal representative, and not by the beneficiary, which decision is controlling upon this Court, and was not called to the attention of this Court either in the brief or oral argument, for the reason that the decision was rendered on the 13th day of May, 1912, subsequent to the time that the briefs were filed in this cause, and only a few days before the oral argument herein, which was on the 20th day of May, 1912, and at the time of that oral argument, counsel for plaintiff in error had not been apprised of this decision, which is **American Railway Company against Birch**, reported in Supreme Court Reporter (West publication), Vol. XXXII, at page 603 (224 U. S. 547).

VI.

That this Honorable Court seems to have misunderstood the instruction given and excepted to as to the measure of damages, and, in the opinion, holding that the instruction given by the Court on that question excluded all elements except those enumerated therein, is an oversight, in that said instruction does not exclude any elements, but simply calls to the attention of the jury certain matters it may consider. This is not within the rule that all things not enumerated are excluded.

VII.

That under the Act of Congress, which applies to this case, it was error to instruct the jury that three-fourths of their number could return a verdict.

I.

This Court in its opinion and judgment herein misunderstood the pleadings.

The defendant in error sought to justify the presence of the deceased upon the train at the time of the injury by alleging in her petition that the plaintiff in error was engaged as a common carrier in carrying express, freight and passengers, the particular allegations being as follows:

> "And as such, during all of said times, has been engaged in the railroad business in the States of Kansas and Oklahoma, and elsewhere, as a common carrier of freight, express and passengers for hire." (Par. 1, Petition, C.-m., p. 2.)
>
> "That during all the time mentioned said defendant corporation, as a part of its said railroad business, owned, and was engaged in operating a certain line of railroad extending from St. Louis, Missouri, southerly to Parsons, Kansas, and thence from Parsons, Kansas, southerly to the stations of Verdark and Muskogee, in the State of Oklahoma, to points in the State of Texas, over which line of railway said defendant, during all the times herein mentioned, was actually engaged in carrying and transporting freight, express and passengers for hire by trains of cars drawn by steam locomotives by it owned, operated and maintained; that said line of railroad consisted of what is known as single track line, and was, and is, of the usual form of construction, and by said defendant owned and maintained." (Par. 2, Petition, C.-m., pp. 2 and 3.)
>
> "That at and prior to the time and death of said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by said defendant company over its said line or railroad be-

tween said City of Parsons, Kansas, through the State of Oklahoma to points beyond in the State of Texas; that in addition to his duty and employment as express messenger, as aforesaid, this said William B. West also engaged in handling passenger baggage upon the express cars of said defendant company" (Par. 5, Petition, C.-m., pp. 3 and 4).

"That on May 15th, 1908, at about 12 o'clock noon of said day, said William B. West, in the course of his employment as hereinbefore set out, was riding in one of the express cars of said defendant company attached to one of the regular trains of said defendant company over said railroad line in a southerly direction in the State of Oklahoma, which train was one of the regular passenger trains of said defendant known as 'No. 5' and also known as the 'Katy Flyer,' and that when said train reached the point in said State of Oklahoma a short distance southerly of the Arkansas River, between the said stations of Verdark and Muskogee, in said State of Oklahoma, said train upon which the said William B. West was so riding, in the performance of his duties as aforesaid, was, by said defendant railroad corporation, through gross carelessness and negligence upon its part, etc. * * *" (Par. 6, Petition, C.-m., p. 4).

These allegations are the only statements contained in the petition that attempt to throw any light upon the right of the deceased to be upon the train at the time of the accident.

A demurrer was filed to this petition by this plaintiff in error, and the court overruled the demurrer upon the theory of the defendant in error, which was that the allegations above stated were sufficient to charge that the deceased was in the employ of this plaintiff

in error, and, therefore, thus showed the right of the deceased to be upon the train at the time of the accident.

The Court overruled the demurrer upon that theory, as no other possible theory could be advanced for overruling the demurrer to the petition, as the petition did not charge that the American Express Company had any contract with this plaintiff in error, or any other person, to handle the express, and it is not charged that the American Express Company is engaged in handling express. The only inference to be drawn from these allegations is that the deceased was employed by the American Express Company as express messenger and baggageman for the plaintiff in error.

If this is not true, then the deceased was a trespasser and the petition would wholly fail to state a cause of action.

This Honorable Court, on page 9 of the opinion, states:

> "It is insisted that the intestate was not in the employ of the plaintiff in error, but in that of the American Express Company. Under the issues as framed said intestate was an employe of the express company and not of the railway company."

Neither the answer of the plaintiff in error, the reply of the defendant in error nor the rejoinder in any wise affects the allegation contained in the plaintiff's petition.

II.

This court in its opinion and judgment herein misunderstood the evidence.

At page 14 of the opinion of the court, it is said:

> "Under the undisputed evidence in the record, the American Express Company paid the intestate his salary, the railway company paying the express company for the handling of baggage."

It is submitted that this statement as to the manner of the payment of salary to West is not fairly borne out by the record, and does not accurately reflect the testimony upon this proposition. The record can bear no other construction than that the railway company paid one-half of West's salary, and did not pay the express company for handling of baggage, as stated in the opinion.

Beginning at page 172 of the record, Mr. F. D. Adams, General Superintendent of the Southern Division of the American Express Company, stated that the deceased, at the time of his death, was a joint messenger and baggageman, and worked for both the express company and the plaintiff in error. Portions of his testimony were quoted in the reply brief of the plaintiff in error, at pages 32 to 35. It is not deemed necessary to again quote this testimony, but the attention of the court is respectfully directed thereto, because it shows conclusively that West was an employe of the railway company. The testimony of Mr. Adams is direct, positive, unequivocal and uncontradicted upon this proposition, and his language with reference to the payment of salary, which is misunderstood by this court, is as follows:

"Q. Do you know what proportion of his salary was paid by those companies (the express company and the railway company) or whether it was paid in any proportion?

"A. Equal proportion" (Rec., p. 173).

and upon cross-examination Mr. Adams said:

"Q. Who paid West?

"A. He drew his money from the express company.

"Q. All of his salary came from the express company?

"A. Yes, sir.

"Q. And for any work he done for them in handling baggage, the railroad company would pay over to the express company?

"A. They paid us one-half of his salary; we drew a bill against them in his name and the other baggagemen" (Rec., pp. 177-8).

It was further shown by the testimony and conceded by counsel for defendant in error, that the deceased handled baggage for the plaintiff in error, as its baggageman, as a joint employe of the two companies. The record is as follows:

"Mr. Allen: We offer to show by Mr. Adams that at the time Mr. West went into the service as messenger, he understood that it was his (West's) duties to perform joint services for the railway company and the express company.

"Mr. Taylor: Further than the matters offered to be shown and I admitted by the pleadings, we object to the offer as incompetent, irrelevant and immaterial" (Rec., p. 176).

This testimony of Mr. Adams' that West was the joint employe of the railway company and the express

company presented an issue and there was no evidence to dispute it.

The Court further misapprehended the evidence in the case on the questions of the release contracts offered in evidence and excluded. Objection was made to the introduction of them because under the law of the State of Kansas they were void, but there is no evidence in the case proving, or tending to prove, that the contracts, or any of them, were executed in the State of Kansas. Where the contracts, or any of them, were entered into is not shown, and this court in its opinion seems to assume that the evidence shows that the contracts were made in the State of Kansas and that the decisions of the Supreme Court of Kansas are controlling.

This court further assumes that the deceased was riding on a free pass at the time of the injury, and was a passenger upon the train at that time and could not waive his rights against the negligence of the plaintiff in error but there is no evidence whatever to establish the fact that West was riding upon a free pass. On the contrary, the evidence does establish that he was riding as a joint employe of the plaintiff in error and the express company, and, therefore, as far as this plaintiff in error is concerned, he did not in any respect bear the relation of a passenger, and the law as to the duties which the plaintiff in error might owe to a passenger has no application to this case.

This case does not call for an opinion upon the duties which the plaintiff in error might owe to a passenger. Such a question was not presented by the pleadings, nor in the evidence, nor in the brief of counsel, and the court in discussing this proposition in con-

nection with this case has clearly misapprehended the evidence as contained in the record.

III.

This cause was tried on the theory that the issue was made by the pleadings that the deceased, W. B. West, was an employe of the plaintiff in error, railway company, and that the evidence at the trial showed that he was such an employe, and under decisions controlling upon this court, to which the attention of this court was not called either in the brief or oral argument, this case must be decided by this court upon that theory.

This court holds that the Federal Employers' Liability Act of April 22nd, 1908, 38 U. S. Stat. at L., at page 65, does not apply to this case and that the pleadings were not so framed as to present the issue whether the deceased was an employe of the railway company or the express company.

Page ten of the opinion of the court contains extracts from the petition and the third amended answer. The court holds that this third amended answer does not present the issue. It is submitted that in this the court has erred, but the point to which the court's attention is directed in this petition, and which was not considered in the opinion, is that this case was tried upon the theory that the issue was clearly defined by these pleadings. Counsel for the defendant in error understood that the issue was presented by the pleadings and proceeded throughout the trial as though it were presented. Counsel for plaintiff in error understood that the issue was presented and introduced testimony that the deceased was an employe of the rail-

way company and tried the case throughout upon that theory and the trial court construed the pleadings to present that issue, and directed the course of the trial upon that theory, and that theory controlled its action at the trial, its rulings with reference to the admissibility of evidence, and the giving and refusing of instructions.

It is the law that when a case is tried as though an issue were presented, whether or not there is a word in the pleadings to justify the presumption, the appellate court in reviewing the case will consider it as though the issue were definitely defined by the pleadings.

It is a well-accepted doctrine and fully recognized by this court in previous decisions controlling upon this court, that a litigant cannot depart upon appeal from the theory of his case which he adopted in the trial court. This doctrine has been expressly announced by the Supreme Court of the Territory of Oklahoma in **Morrison v. Atkinson**, 16 Okla. 571, 85 Pac. 472, which decision is controlling upon this court. The syllabus written by the court, reads as follows:

> "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Hence, where a party assumes a position and asserts a legal right in the District Court, and there asks the benefit of that position, he is estopped from denying the legality of that position on appeal to the Supreme Court."

In the body of the opinion it is said:

"Now when they asked the court to enforce that rule, they in effect said that the rule was a valid one, and that they desired the benefit of it. The matter was tried in the court below on the theory that rule 19 should be enforced. The only question for the court to determine was, who was in default according to the terms of that rule. The determination of the court was unquestionably correct if the rule was a valid one; and, according to the doctrine laid down by the Minnesota Supreme Court in the case of **Davis v. Jacoby**, they cannot be heard to complain that the rule invoked was erroneous, if the result be correct according to the theory they adopted. In other words, counsel for defendant below, in their motion for judgment, alleged that said rule 19 was legal, and pleaded that they had complied therewith, and that plaintiff below had failed to comply with the requirements thereof, and for that reason they asked that judgment be entered in said cause in favor of said defendant. Hence it is evident that the position now taken by counsel for said defendant is inconsistent with the position which they occupied when they filed and urged said motion for judgment for non-compliance with said rule 19."

The Supreme Court of the State of Kansas prior to the time that the Kansas Code was adopted in Oklahoma, held that where a case was tried as was the case at bar, upon the assumption that an issue was presented, that the appellate court will not take a contrary position, but will construe the pleadings as the same were construed by the parties in the trial court. In **Bent v. Philbrick**, 16 Kan. 190, cited in 1876, it is held that where a record fails to contain any reply to an answer alleging new matter, but the case was tried by both parties without any objection on account of the

want of a reply, and as though a reply had been filed, that the Supreme Court will treat the case in the same way. In the opinion of the court it is said:

> "As no reply appears in the record, it would seem as though there were nothing to try and that the court, upon the pleadings, should have entered judgment for the $500.00 and twelve per cent interest. But the case was tried by both parties as though the allegations of new matter in the answer was denied; and we shall take the case upon that basis, as in our judgment, upon that basis, there was such error as requires a reversal."

In **Holden v. Clark**, decided by the Supreme Court of Kansas (1876), 16 Kan. 346, 347, it is said:

> "Counsel for defendants in error raises the question that the plaintiff's reply was not verified by an affidavit, and therefore that it did not put in issue some of the allegations of the defendant's answer. The case was tried, however, in the court below, in the same manner as though it was considered by all the parties that the reply was sufficient, and therefore, this court will now treat the case in the same way."

In **Herbert v. Wagg**, 27 Okla. 674, decided by this court, this doctrine is succinctly stated in the syllabus which was prepared by the court, as follows:

> "A party bringing an action is required to frame his pleading in accord with some definite, certain theory, and the relief to which he claims to be entitled must be in accord therewith; on appeal he is bound by the position and theory assumed and on which the case was heard in the trial court."

In **M., K. & T. Ry. Co. v. Wilhoit**, Circuit Court of

Appeals, Eighth Circuit, 160 Fed. 440, it was contended in that court that the doctrine of assumption of risk could not be invoked because the issue was not raised by the pleadings. Mr. Justice Van Devanter, then Circuit Judge, delivering the opinion of the court, said:

> "The Court of Appeals was of opinion that this defense was not available to the defendant because it was not affirmatively pleaded in the answer. But the question of pleadings thus suggested was not raised upon the trial. On the contrary, as the record discloses, each of the parties, without objection from the other, introduced testimony addressed to the question of the plaintiff's assumption of risk, both presented requests for instructions bearing thereon, and the court charged the jury upon that subject. We must, therefore, give effect to the settled rule, that when the parties, with the assent of court, unite in trying a case on the theory that a particular matter is within the issues, they will not be permitted to depart therefrom when the case is brought before an appellate court for review" (citing a large number of cases).

In **New York, L. E. & W. R. Co. v. Estill,** 147 U. S. 591, 37 L. Ed. 292, it is said:

> "As to paragraph 3 in brackets, it is contended by the defendant that the court should have directed the jury that the value of the cattle when delivered at the western terminus of the railroad of the defendant, in Ohio, and not their value at the final destination of the cattle in Saline County and Howard County, Missouri, should be the basis on which to estimate the damages. But it does not appear that any such claim was made in the court below. Both parties introduced their evidence and tried the cases on the theory that the value of the

cattle in Saline and Howard Counties was the proper basis for fixing the damages."

It is clear that counsel for defendant in error understood the allegations of the answer above referred to, charged that West was an employe of the railway company, because in reply to that answer, they specifically alleged and made a part of their reply, and quoted therein a statute in Kansas making railway companies liable to employes for damages, in consequence of any negligence on the part of the railway company, or its employes (Rec., pp. 85-87). This statute, as quoted from the reply, reads as follows:

> "Every railroad company organized and doing business in the State of Kansas **shall be liable for all damages done to any employe** of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employes, to any person sustaining such damage; *provided*, that notice in writing that an injury has been sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within eight months after the occurrence of the injury."

In view of this express allegation of the reply, it is evident that counsel for defendant in error thoroughly understood the answer to present the issue that West was an employe of the railway company, and they sought to meet it by confessing that fact and seeking to avoid its effect by virtue of the provisions of the statute. These allegations of the reply cannot be anything else but an express admission that West was an employe of the railway company. If it were necessary for any stronger evidence of the fact that the issue was

joined, it is clear from the further conduct of counsel for defendant in error in relying upon the three Kansas cases, **Sewell v. A., T. & S. F. Ry. Co.**, 96 Pac. 107; **A., T. & S. F. Ry. Co. v. Fronk**, 74 Kan. 915, 18 Pac. 968; **Kan. Pac. Ry. Co. v. Peavey**, 29 Kan. 169, 44 Am. State Rep. 630, sustaining judgments for damages in favor of the railway employes, to show that the statute in question was applicable to this case. Their conduct in this particular thus constituted a further express admission that West was an employe of the railway company.

The trial court construed the pleadings to present the issue. This is evident from the fact that when counsel for plaintiff in error introduced proof of the relationship which West bore to the railway company, and counsel for defendant in error made an objection, the court called their attention to the fact that they had pleaded that West handled the baggage for the railway company. The record as to these proceedings is as follows:

> "Q. At that time do you know what relation existed between Mr. West and the M., K. & T. Railroad Company with reference to handling baggage of that company?
>
> "A. Yes, sir.
>
> "Q. What was that relation, Mr. Adams?
>
> "Mr. Taylor: I would like to ask first if there was anything in writing, any written agreement?
>
> "By the Court: Don't you plead, Mr. Taylor, he also handled passenger baggage?
>
> "Mr. Taylor: Yes, sir; we plead it" (Rec., pp. 172-3).

Thereupon the witness was permitted by the court to testify that West was an employe of both companies,

and was paid his salary in equal proportion by both companies. The testimony of this witness, Mr. F. D. Adams, General Superintendent of the Southern Division of the American Express Company, upon this proposition, is quoted at pages 32 to 35 of the reply brief of plaintiff in error. This testimony is positive that West was a joint employe of both companies. The trial court should not have admitted this testimony had it been of the opinion that the pleadings did not require it to do so.

As further proof of the construction which the trial court placed upon these pleadings, it overruled an objection of counsel for defendant in error to an offer of counsel for plaintiff in error, to prove by Mr. Adams that West understood that he was to perform joint service for the railway company and the express company and permitted proof of this character to go to the jury. The record is as follows:

> "Mr. Allen: We offer to show by Mr. Adams that at the time Mr. West went into the service as messenger he understood that it was his (West's) duty to perform joint services for the railway company and the express company.
>
> "Mr. Taylor: Further than the matters offered to be shown and I admitted by the pleadings, we object to the offer as incompetent, irrelevant and immaterial.
>
> "By the Court: I think I will let him answer the question; objection overruled.
>
> "Mr. Taylor: The plaintiff excepts" (Rec., p. 176).

If the court had been of the opinion that the issue was not joined, it undoubtedly would not have permitted this testimony to go to the jury.

The court further permitted the plaintiff in error to introduce testimony, as heretofore shown, that the railway company paid one-half of the salary of the deceased, and the purpose for which this testimony was offered was stated by counsel for plaintiff in error, at Rec., p. 17[illegible], as follows:

> "Mr. Ralls: We offer this for the purpose of showing that the deceased was a joint employe of the American Express Company and the M., K. & T. Railroad Company, while he was running as messenger on the line."

The court, with the full understanding of the purpose of this testimony, admitted it over the objection of counsel for defendant in error, and there certainly was not the slightest misunderstanding on the part of the court, or of any one connected with this case, that this issue was clearly and distinctly drawn, and it is manifest that the case was tried throughout on the theory that there was such an issue to be determined.

As further proof of the fact that this case was tried upon the theory that West was an employe of the railway company, it will be noted that it never occurred to counsel for defendant in error that such was not the theory of the case until it was suggested by a member of this court at the oral argument, that possibly the pleadings did not raise the issue. Counsel for defendant in error then seized upon the point and urged it as best they could at the oral argument and later filed a typewritten brief in answer to the reply brief of the plaintiff in error, where this point is enlarged upon. It is respectfully submitted that this court, even if there had been any merit in this point, should not have considered same, because it was not within the theory of

the case, nor within the propositions urged by counsel for defendant in error upon the appeal of this case. This circumstance of counsel for defendant in error is proof conclusive that all parties to this suit understood that the question of West's employment with the railway company was a provable fact under the issues in this case.

IV.

The plaintiff in error did not waive its exceptions to the action of the trial court in sustaining the objections of the defendant in error to the evidence offered by the plaintiff in error and made a proper offer for the introduction in evidence of the contract between the express company and the plaintiff in error.

The original brief on the part of the plaintiff in error was written upon the theory that West was a joint employe of the railway company and the express company, and the record fully bears out that fact. The evidence offered by the plaintiff in error, and which was excluded by the trial court, and which this court holds was not properly presented to it under its rules for review, was corroborative of evidence of the plaintiff in error establishing that the deceased was an employe of the plaintiff in error, and the parties, by their pleadings and in the trial of the case, assumed as an established fact that West, at the time of the accident, was an employe of the plaintiff in error, and by reason of being such an employe had the right to be upon the train at the time of the injury. The evidence referred to by the Supreme Court is a written communication dated July 21, 1897, transmitted by F. D. Adams, as General Superintendent of the American Express Company, to the said West, reminding him that

he was an employe of the plaintiff in error as well as the American Express Company in the performance of the duties which were the identical duties referred to in the defendant in error's petition in this cause, and which written communication, so far as applicable to the question under consideration, is as follows:

> "In some instances I find there has been considerable controversy between messengers and train crews on joint runs in regard to your duties to the railroad company. Inasmuch as the railroad company pay a portion of your salary you are just as much an employe of the railroad on which you run as you are of the express company, and you must be just as careful of their interests as you are of this company, and perform your duties to that company, as near as possible, in the same manner that they would be performed by exclusive baggagemen."

This fact as to the employment of West was not denied by defendant in error until her counsel filed their brief, and counsel for plaintiff in error had no reason whatever to believe that counsel for defendant in error, in view of this record, would assume the position which they did in their brief, that there was no proof of this joint employment.

There was no necessity whatever for presenting to this court this error in excluding testimony, and if such error had been presented in the original brief of plaintiff in error, the brief would have been subject to the criticism that it was inconsistent. Had counsel for plaintiff in error had the slightest intimation that counsel for defendant in error would take the position which they did in their brief and oral argument, which is entirely at variance with the record, and that this court

would adopt that position as correct, regardless of this inconsistency, they would have presented to this court the error of the trial court in refusing to admit this evidence, but probably would have been met with the answer that in view of the undisputed testimony in the record that such error was harmless.

It is submitted that the record in this case does not call for an opinion as to whether or not there was error in the trial court in excluding this testimony, and for that reason the point was not presented in the original brief; and the attention of the court was called to it in plaintiff in error's reply brief, because counsel for defendant in error had assumed such an anomalous position in their brief that if this court adopted that position the error of the trial court in excluding this testimony became manifest.

This question as to the employment of West by the railway company should not be treated thus lightly, and the entire record upon this proposition disregarded merely because the trial court excluded one item of that proof, and the action of the trial court is not assigned as error. The question whether the defendant in error can recover in this case depends entirely upon whether West was an employe of the railway company. Therefore, this question of employment is one of paramount importance in this case, and in the opinion and holding of the court this important fact is not considered, but is swept aside as of little or no importance.

This court states in its opinion that the plaintiff in error did not see fit to plead nor to offer in evidence the contract between the railway company and the express company, and asserts that the presumption is that such contract would have been against the contention of the railway company. It is conceded that the

contract was not pleaded, and it was not necessary to plead same, because proof of the employment of West by the railway company could properly be made and was made regardless of the written contract, but the record in this case does not fairly support the statement in the opinion that at no place in this record was any offer made to produce this contract or to show what the contract was, because the record affirmatively shows that the predicate was laid and the offer made for the introduction of this contract.

The contracts between the express company and the deceased were first offered in evidence, but were not admitted by the court. The orderly method of procedure was to offer these contracts between the express company and the deceased first in point of time, and to follow them by the contract between the express company and the railway company, and counsel for plaintiff in error, observing the logical sequence for the introduction of testimony, offered to follow up these contracts between the express company and the deceased by introducing the contract between the express company and the railway company. The record showing these proceedings is as follows:

> "And we expect to follow that up by showing that the American Express Company did enter into a contract releasing the M., K. & T. Railway Company from liability for any of the accidents provided for in this application and that the accident which caused his death was one that was covered by the provisions of this application and that it released the M., K. & T. Railroad Company from any liability on account of the death of West, and the witness we had on the witness stand was to show the signature of West and to show further

that he was employed and worked under the terms of these contracts" (Rec., p. 167).

It would have been entirely useless and would have served no purpose, but to encumber the record, to proceed further with this offer or to attempt to put this contract into the record, in view of the ruling of the trial court in declining to admit the other contracts.

It is stated in the opinion that the conduct of the railway company indicates that if this contract were in evidence it would be fatal to its contention, and that the presumption arises that had proffer been made it would have been against the plaintiff in error. In order to set the court right upon this proposition, and to show that there was absolutely no intention of concealment whatever on the part of the plaintiff in error, but that it was proceeding strictly in accordance with law in the introduction of its testimony, a copy of this contract is attached to this petition and marked "Exhibit A," and it will be observed from an examination of this contract that it shows conclusively that West was an employe of the railway company. Article eleven provides in part as follows:

> "*Provided*, however, that in all cases where the same person acts jointly as **Baggageman for the Railway Company** and Express Messenger for the Express Company, then that any sum or sums paid out in settlement or satisfaction of any claims made or judgment recovered on account of injuries sustained by such joint employe in the course of such joint employment while upon the road of the railway company, shall not be assumed or borne by the express company, exclusively, but shall be borne and paid by both the railway company and the express company in the same proportion as

they may have contributed to the salary of such **joint employe** at the time such injuries are sustained by him, but neither party, however, shall have the right to compromise or settle any claim or suit for such injuries without the consent in writing of the other party thereto'' (bold-face type ours).

The case of **A., T. & S. F. Ry. Co. v. Davis and Young,** 26 Okla. 359, 109 Pac. 551, cited in support of the opinion upon this proposition, is not in point. In that case there was no offer whatever made of the testimony as in the case at bar, and this contract would have been in the record had it not been that the court sustained the objection of counsel for defendant in error to the introduction of it, together with the other contracts offered in evidence.

It is respectfully submitted that the opinion of this court is in error upon these propositions and should be reconsidered, and instead of announcing that the errors of the trial court with reference to the introduction of testimony were waived, should lay down as the law that regardless of these two items of testimony the record in this case shows undisputably that West was an employe of the railway company, and the case should be determined by this court upon that theory, and upon no other.

V.

The Supreme Court of the United States has definitely decided that this action must be brought by the personal representative, and not by the beneficiary, which decision is controlling upon this court.

On the 13th day of May, 1912, only a few days before the oral argument in this case, there was handed

down by the Supreme Court of the United States a decision in the case of **American Railway Co. of Porto Rico v. Birch**, reported in Supreme Court Reporter (West Publication), Vol. 32, at page 603 (224 U. S. 547), wherein the Supreme Court decides clearly that actions under the Federal Employers' Liability Act must be brought by the personal representative and cannot be brought by the beneficiary. In the opinion by Mr. Justice McKenna, it is said, in answer to the contention that the beneficiary could maintain the action:

> "But the words of the act will not yield to such a liberal construction. They are too clear to be other than strictly followed. They give an action for damages to the person injured, or, 'in case of his death, * * * to his or her personal representative.' It is true that the recovery of the damages is not for the benefit of the estate of the deceased, but for the benefit 'of the surviving widow or husband and children.'
>
> "But this distinction between the parties to sue and the parties to be benefited by the suit makes clear the purpose of Congress. To this purpose we must yield. Even if we could say, as we cannot, that it is not a better provision than to give the cause of action to those in relation to the deceased. In the present case it looks like a useless circumlocution to require an administration upon the deceased's estate, but in many cases it might be much the simpler plan and keep the controversy free from elements but those which relate to the cause of action. But we may presume that all contending considerations were taken into account and the purpose of Congress expressed in the language it used.
>
> * * * "The national act gives the right of action to personal representatives only."

In view of the fact that West was an employe of the railway company, and this fact is undisputed in the record in this case, this decision of the Supreme Court of the United States is controlling and fully determines the rights of the parties.

VI.

This Honorable Court seems to have misunderstood the instruction given and excepted to as to the measure of damages, and the opinion holding that the instruction given by the court on that question excluded all elements except those enumerated therein is an oversight in that said instruction does not exclude any elements, but simply calls to the attention of the jury certain matters it may consider. This is not within the rule that all things not enumerated are excluded.

The plaintiff in error had the right to have the jury instructed that they should not consider mental anguish or loss of society.

> "Each party has the right to have the jury instructed upon the law of the case clearly and pointedly, so as to leave no reasonable grounds for misapprehension or mistake, and if the instruction of the court fails thus to instruct it is error to refuse one calculated to cure the omission."
>
> **Brickwood's Sackett on Instructions,** Vol. 1, Sec. 156, and authorities cited.

The failure to give this charge cannot be said to be harmless error, as this court, in its opinion, admits that the amount of recovery is right at the verge, and the probability of a jury being influenced in assessing its damages by such hideous photographs as shown in the evidence of the defendant in error at pages 218 and 219 would naturally arouse the sympathy of the jury

and cause the jury to review the accident resulting in death.

VII.

Under the Act of Congress, which applies to this case, it was error to instruct the jury that three-fourths of their number may return a verdict.

It is submitted that that portion of the decision holding that there was no error in the court instructing the jury that three-fourths of their number could return a verdict is erroneous. If this were a case controlled exclusively by the state laws the question would be different, and it may be that the decision of this court under a case controlled by state laws is correct, but it is not necessary to consider that question in this petition for a rehearing, because such is not the case presented to this court.

Under the Constitution of the United States there must be a unanimous verdict of the jury, and this cause of action arises under the Federal Employers' Liability Act, and Congress derived its authority to pass this act by virtue of the Constitution of the United States, and all questions in this case must be decided under that Constitution and the Acts of Congress passed in pursuance thereof. This portion of the opinion of the court is, therefore, in error, because it is predicated upon the erroneous theory that West was not an employe of the railway company, and upon the further erroneous theory that the Constitution of the United States and the Acts of Congress above referred to do not apply to the case.

Wherefore, plaintiff in error prays that it be granted a re-hearing herein, and that upon such re-hearing the opinion of this court heretofore rendered herein be

reversed, and that the judgment which this opinion sustains be reversed, and that judgment be rendered in favor of this plaintiff in error, and further that it be restored to all the rights and privileges which it has lost by reason of the several errors herein complained of, as well as the errors of the trial court.

"EXHIBIT A".

This Agreement made and entered into this 23rd day of September, 1902, by and between the Missouri, Kansas & Texas Railway Company (of Kansas), party of the first part, hereinafter designated as the "Railway Company," and the American Express Company (a joint stock association), party of the second part, hereinafter designated as the "Express Company."

Witnesseth that,

Whereas, the Railway Company is the owner of and operates the following lines of railway, namely:

	Miles
St. Louis (Texas Junction) to Red River	629.2
McBaine to Columbus	8.8
Hannibal to Franklin Junction	104.5
Walker to El Dorado Springs	13.9
Kansas City Junction to Paola	86.4
Junction City to Parsons	156.8
Moran to Iola	13.4
LaBette (Mineral Jct.) to Mineral	15.6
McAlester to Krebs	4.2
Paola to Coffeyville	124.9
Mineral to Joplin	29.1
Atoka to Coalgate	14.1
	1,200.9

And Whereas, the Railway Company operates

its passenger trains over the following lines of railway under contracts with the owners thereof, namely:

	Miles
Texas Junction to St. Louis	26.9
Paola to Kansas City	43.0
Iola to Piqua	7.1

And Whereas, the Railway Company has projected the construction of the following lines of railway and upon the completion thereof will operate its trains thereover, namely:

Stevens to Oklahoma City	172.84 miles
Fallis to Guthrie	22.75 miles
Wybark to Cleveland	79.03 miles

And Whereas, during the life of this contract the Railway Company may build or acquire other lines of railway or operate its passenger trains over additional lines under trackage rights contracts:

And Whereas, the Express Company is now conducting an express business over the lines of railway of the Railway Company, which contract expires on February 1st, 1903, and desires to continue to operate its business over the lines of railway of the Railway Company.

Now, Therefore, in consideration of the premises, and of the mutual covenants herein contained to be by each of the parties hereto respectively kept and performed, it is agreed as follows:

ARTICLE I.

In consideration of the payments, covenants and agreements to be by the Express Company duly made, performed and observed, the Railway Company hereby agrees to transport in cars or car

compartments, properly lighted and warmed, at its expense, and attached to its passenger trains each way daily, the messengers, safes, packing trunks and express matter of the Express Company to and from all stations upon its lines of railway and branches which it now owns or is operating its trains over as above described and over the projected lines when operated by the Railway Company as above described, *provided*, that on the lines of railway between Texas Junction and St. Louis, Paola and Kansas City, Iola and Piqua, the Express Company shall do no local business.

ARTICLE II.

It is understood that the word "messengers" as used in Article I hereof shall comprise only such persons as accompany the freight and valuables of the Express Company; and the Railway Company agrees to transport such messengers and such other agents as the Express Company may necessarily send over the Railway Company's lines in the transaction of its business as express carrier, free of other charge than the consideration embraced in this contract, provided the properly authorized officers of the Express Company make application in writing for passes for such messengers or agents.

ARTICLE III.

The Railway Company shall also provide and allow the Express Company free approach and access to all depots, station premises and trains, and reasonable time to load and unload express matter upon and from these trains.

ARTICLE IV.

The Railway Company will also, as far as it can conveniently do so, and without charge there-

for, permit the Express Company to use a portion of its station houses on the lines herein mentioned for the reception, safekeeping and delivery of express matter carried under this agreement. The Express Company will also be permitted, when agreeable to the Railway Company, to employ as its agents any agents of the Railway Company whenever such employment by the Express Company shall not conflict with their duties to the Railway Company; the Express Company to be liable for the acts of such agents done by them within the scope of their authority as employes of the Express Company, but not otherwise.

Where the same person is employed as agent by the Express Company and the Railway Company the delivery by such person to the express messenger on the train, of money packages belonging to or consigned to the Railway Company by such person shall constitute the delivery to the Express Company; and the delivery to such person of money packages addressed to the Railway Company consigned to such person shall constitute a delivery by the Express Company.

ARTICLE V.

The Railway Company further agrees to transport free at its risk over its lines covered by this agreement the horses, wagon, safes, and material necessary to be used by the Express Company at the various points on said lines in the transaction of the business contemplated by this agreement.

ARTICLE VI.

The Railway Company further agrees that none of its employes, for himself or for the Railway Company, shall be allowed during the continuance of this agreement to transport money, valuable packages, goods, or merchandise of any kind what-

soever, except regular passenger baggage, and supplies for the Railway Company's eating houses, upon the passenger trains of the said Railway Company, except that the Railway Company reserves the right to transport dogs on its passenger trains, when accompanied by owners, and also to transport corpses.

ARTICLE VII.

It is further understood and agreed by the parties hereto that the Railway Company will not contract with any other party or parties to do any express business over said road or any portion thereof during the existence of this agreement.

ARTICLE VIII.

It is further agreed by the Railway Company that if other lines of railroad are constructed, leased, operated or acquired by the Railway Company during the life of this agreement, the Express Company shall have the same exclusive facilities on all such lines in so far as the Railway Company can legally grant such facilities. It being understood that if the Railway Company, by its trackage arrangements with other railroad companies, which it may deem best to make hereafter, or if it is compelled by legislation or judicial proceedings to grant to any other express or transportation company facilities for carrying on an express business on its lines, or any part of same, the revenue derived from the facilities so afforded such other express or transportation company shall be credited to the Express Company in its payments provided for under Article IX of this agreement; and it is further agreed that the compensation to be charged such other express or transportation company or companies shall not be less than

the compensation provided for under the ninth article of this agreement for the same service.

ARTICLE IX.

In consideration of the execution of this agreement and the performance by the Railway Company of its several agreements set forth herein, the Express Company hereby agrees to make payments to the Railway Company as follows, to-wit:

(*1*) To pay monthly to the Railway Company, on, or before the 10th day of each month, the sum of Eleven Thousand and Seventeen and Eighty-eight Hundredths Dollars ($11,017.88), which payments shall be made by the Express Company to the Treasurer of the Railway Company at New York.

(*2*) The Express Company further agrees that when the projected lines of the Railway Company in the Indian Territory and Oklahoma as above described are completed and the Railway Company begins the operations of its passenger trains thereover, in consideration of such additional exclusive express facilities, the guaranteed monthly payment by the Express Company shall remain Eleven Thousand and Seventeen and Eighty-eight Hundredths Dollars ($11,017.88) per month.

(*3*) The Express Company also agrees that on or before May 1st succeeding January 31st of each year covered by this agreement, it will render to the Railway Company a statement showing the gross revenues derived by the Express Company on business transacted by it on the lines embraced in this agreement, and also the gross revenues derived by it on the lines embraced in an agreement of even date herewith between the said Express Company and the Missouri, Kansas & Texas Railway Company of Texas for the preceding year ending with January 31st, and the Express Com-

pany further agrees that if fifty (50) per centum of the gross revenues derived by the said Express Company from the business transacted by it upon the lines of railway of the Missouri, Kansas & Texas Railway Company (of Kansas) and the Missouri, Kansas & Texas Railway Company of Texas, as shown by said statement, shall exceed the sums already paid by said Express Company to said two Railway Companies for the facilities rendered during the period covered by said statement, it will forthwith pay to the said two Railway Companies the amount of such excess sum, and that such payment may be made to the said Missouri, Kansas & Texas Railway Company (of Kansas), party of the first part hereto, and by it divided between itself and the Missouri, Kansas & Texas Railway Company of Texas in such proportions as may be agreed upon between them.

It is expressly understood and agreed, however, that the Express Company shall only account to the Railway Company for twenty-five (25) per centum of the gross revenue derived from the transportation of money.

The gross revenue from matter carried wholly upon the lines of said two Railway Companies shall be deemed to be the whole amount received by the Express Company from such matter, not including the charges due to or advanced to other express or transportation lines or persons.

The gross revenue derived from express matter carried by the said Express Company partly upon the lines of said two Railway Companies, or one of them and partly upon other lines, shall be such proportion of the total revenue derived from such transportation as the distance carried over said two Railway Companies' lines, or either of them, bears to the entire distance such matter is carried by the said Express Company.

ARTICLE X.

The Express Company agrees to give to the Railway Company at any and all times full and free access to all books and records of accounts of the business embraced in this agreement.

ARTICLE XI.

It is further mutually understood and agreed by and between the parties hereto, that the Express Company will assume all risk and damage to its property, freight and valuable packages and also assume all risk and damage to its agents and messengers while on said road in the course of their employment, including damages arising from the negligence or carelessness of the agents or employes of the Railway Company; *provided*, however, that in all cases where the same person acts jointly as baggageman for the Railway Company and express messenger for the Express Company, then that any sum or sums paid out in settlement or satisfaction of any claims made or judgments recovered on account of injuries sustained by such joint employe in the course of such joint employment while upon the road of the Railway Company shall not be assumed or borne by the Express Company, exclusively, but shall be borne and paid by both the Railway Company and the Express Company in the same proportion as they may have contributed to the salary of such employe at the time such injuries are sustained by him, but neither party, however, shall have the right to compromise or settle any claim or suit for such injuries without the consent in writing of the other party hereto.

ARTICLE XII.

It is agreed that the Express Company will transport all money and valuable packages the

property of the Railway Company free of charge over its said roads and over all lines operated or controlled by the Express Company, and deliver the same at proper places of delivery on same or at the termini thereof, subject to conditions named in the Express Company's printed form of receipt. The Express Company also will transport all matter, property of the Railway Company, over the lines of the Railway Company free of charge.

The Express Company will also transport free of charge the railroad tickets of the Railway Company between Chicago and St. Louis, and will transport free of charge the folders of the Railway Company between any points on all lines of the Express Company, this in consideration of a full page "add" of the Express Company's business in said folders; all shipments of the Railroad Company's tickets and folders to be so marked.

The Express Company will also transport free of charge over its lines matter of any kind, property of the Railway Company, where such shipments do not exceed twenty (20) pounds in weight, between any points reached by said Express Company, and will charge on shipments exceeding twenty (20) pounds in weight, the property of the Railway Company, to or from any points reached by the Express Company, off the lines of the Railway Company, and the Missouri, Kansas & Texas Railway Company of Texas, seventy-five (75) per cent of its regular tariff on such shipments; *provided*, further, that the above rates shall also apply on the business of the Southwestern Development Company, being an associated company of the Railway Company.

ARTICLE XIII.

The Express Company agrees that it will not issue any local rates per hundred pounds between

points on the Railway Company's lines which shall be less than one and one-half (1½) times the Railway Company's freight rate per hundred pounds on the same commodity, between the same points, unless consent to the contrary has been obtained from the traffic manager of the Railway Company, *provided*, however, that no restrictions shall be placed by the Railway Company on the charge to be made by the Express Company on news matter or parcels, and, *provided*, also, that the Express Company shall be permitted to make such rates between competitive points as will enable it to compete successfully with other express companies operating on other lines of railway, the Express Company agreeing to notify the Railway Company of any reduction in rates made on account of competition, and when such competitive rates are reduced to one and one-half (1½) times the freight rates of the Railway Company on the same commodity, the Express Company agrees that no further reduction shall be made in such competitive rates without the consent of the Railway Company.

ARTICLE XIV.

Operations under this contract shall commence on the first day of February, A. D. 1903, and continue in full force and effect until the first day of February, A. D. 1913, being the full term of ten (10) years.

In Witness Whereof, the parties hereto have caused this agreement to be executed on the day and year first above written.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
By HENRY C. ROUSE, *President.*
Attest: R. W. MAGUIRE, *Asst. Secretary.*
(Seal) AMERICAN EXPRESS COMPANY,
By A. ANTISDEL, *General Manager.*

(Rec., pp. 364-406.)

ORDER STAYING MANDATE PENDING PETITION FOR REHEARING.

(Caption omitted.)

On this the 27th day of June, 1912, it being shown to this court that the plaintiff in error has, in good faith, filed a petition for rehearing herein, and that said petition is worthy of consideration by this court.

It is therefore ordered by the court that the mandate herein be stayed until fifteen (15) days after said petition for a rehearing shall have been passed upon by the court (Rec., p. 363).

ORDER SETTING DOWN CAUSE FOR ORAL ARGUMENT ON PETITION FOR REHEARING.

(Caption omitted.)

And now on this day it is ordered by the court that the above cause be set for oral argument on petition for rehearing (Rec., p.. 414).

ORDER GRANTING REHEARING.

(Caption omitted.)

And now on this day it is ordered by the court that the petition for a rehearing filed herein be, and the same is hereby granted (Rec., p. 431).

ORDER SUBMITTING CAUSE ON PETITION FOR REHEARING.

(Caption omitted.)

And now on this day the above cause is argued orally on rehearing, and the cause is submitted, and it is ordered by the court that defendant in error be allowed to file additional copies of brief (Rec., p. 432).

ORDER AFFIRMING JUDGMENT.

(Caption omitted.)

And now this cause comes on for final decision and determination by the court upon the record, briefs, petition for rehearing and oral argument

And the court, having considered the same, finds that the judgment of the court below in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the court below in the above cause, be, and the same is hereby affirmed. Opinion by Kane, J.

All the Justices concur, except Dunn, J., absent (Rec., p. 433).

In the Supreme Court of the State of Oklahoma.

Missouri, Kansas & Texas Railway Company,
Plaintiff in Error,
v.
Ivolue B. West,
Defendant in Error.
} No. 1928.

SYLLABUS.

1. Defendant in error's intestate being an employe of the express company, and not of the plaintiff in error (the railway company), but a passenger on its train at the time of being injured, the Federal Employers' Liability Act of April 22, 1908 (35 U. S. Stat., p. 65; U. S. Comp. Stat. 1901, p. 1322), entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employes in Certain Cases," does not apply.

(*a*) Sections 5945 and 5946, Comp. Laws 1909, apply,

as modified by Section 7, Article 23, Constitution of this State.

2. In view of the Kansas statutes making a railroad company liable for all damages done to persons or property in consequence of any neglect on its part (Gen. Stat. 1901, Sec. 5857), and for all damages done to any of its employes in consequence of any negligence of its agents or by any mismanagement of its engineers or other employes (Gen. Stat. 1901, Sec. 5858), although an express company contracts with the railway company by means of whose trains it carries on its business that it assumes all risk of injury to its employes and undertakes to save the railway company harmless from any claims with respect thereto, and contracts with one of its employes that neither it nor the railway company shall be liable to him for any injury occurring to him while traveling on any of such trains in the course of such employment, such employe may still maintain an action against the railway company for injuries received while so traveling in consequence of the negligence of its agents (following Sewell v. A., T. & S. F. Ry. Co., 78 Kan. 17).

(*a*) Such contract is also void as being against the public policy of this State as expressed by its Constitution and laws.

3. In an action for injury to a passenger, through a head-end collision of a passenger train and locomotive with a locomotive and freight train, both the passenger and freight train being owned and operated by the plaintiff in error, where the undisputed testimony shows that the accident was caused by the negligence of the plaintiff in error, error in instructing as to the

degree of care on the part of the plaintiff in error required is not prejudicial error.

4. The court instructed the jury as follows:

> "If you find for the plaintiff in this case, then in assessing the damages which she is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the widow and children of the deceased, and, determining this, you may consider the probable earnings of the deceased, his age, experience, habits, health, and bodily qualifications, during what would probably have been his lifetime, if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition."

Held, without prejudicial error.

(*a*) Neither is recovery for loss of society of deceased, or mental anguish, permissible, nor was any permitted by said instruction.

(*b*) In determining the pecuniary loss on account of the death of the intestate, the loss of the mental, moral and physical training or advice of the parent, in a suit by or for his child or children, may be taken into consideration in determining the amount of damages recoverable.

(*c*) Recovery may be had only for the loss of such advice or training as would have had pecuniary value, in estimating which, the age and situation of the parties is to be considered, and nothing may be included for the merely sentimental loss.

(*d*) There must be proof that the intestate was fitted by nature or education, or by disposition, to furnish to his children instruction, or moral, physical or intel-

lectual training or advice, in order for the jury to consider the loss of instruction and moral training or advice as an element of pecuniary damages.

5. When the brief of the plaintiff in error, in any civil cause, fails to preserve, by specification of error, any point complained of in the lower court, such question is thereby waived in this court.

Error From the District Court of Muskogee County.

John H. King, Trial Judge.

Clifford L. Jackson,
W. R. Allen,
(M. D. Green on brief),
For Plaintiff in Error.

Chas. H. Taylor,
S. Grant Harris,
(Benj. Martin and Jno. D. O'Brien on brief),
For Defendant in Error.

AFFIRMED OPINION OF THE COURT.

WILLIAMS, J.

This proceeding in error seeks to review the judgment of the district court in an action commenced on July 8, 1909, by Ivolue B. West, the defendant in error, as plaintiff, against the Missouri, Kansas and Texas Railway Company, the plaintiff in error, as defendant, to recover the sum of $50,000 as damages on account of the death of her husband, William B. West, an express messenger and baggageman on one of the trains of the defendant, said death occurring in a collision of passenger train No. 5, commonly known as the "Katy Flyer," upon which the intestate was riding, with freight train No. 412, near Muskogee, Oklahoma, on May 15, 1908.

The petition is as follows:

> "• • • 3. That William B. West, deceased, hereinafter named, left him surviving, as his only heirs at law, the plaintiff herein, his widow, who is thirty-six (36) years of age, and three minor children, whose names and ages are as follows, viz.: Norma H. West, aged sixteen; Glenford B.

West, aged seven years, and Wilmetta M. West, aged two years, and also a posthumous child, born June 29, 1908.

"4. That this action is brought by the plaintiff as widow of said William B. West, and for the benefit of herself, as such widow, and of said minor children of herself and of said William B. West, deceased. * * *

"5. That at and prior to the time of the death of said William B. West, deceased, he was employed by the American Express Company, as express messenger upon the express cars operated by said defendant company, over its said line of railroad operated between said City of Parsons, Kansas, through the State of Oklahoma, to points beyond in the State of Texas.

"That in addition to his duties and employment as express messenger, as aforesaid, said William B. West also engaged in handling passenger baggage upon the express cars of said defendant company.

"6. That on May 15, 1908, at about twelve o'clock noon of said day, said William B. West, in the course of his employment as hereinbefore set out, was riding in one of the express cars of said defendant company, attached to one of the regular trains of said defendant company, being then and there run and operated by said defendant company, over said railroad line in a southerly direction through the State of Oklahoma, which train was one of the regular passenger trains of said defendant, known as 'Number Five,' and also known as the 'Katy Flyer,' and that when said train reached a point in said State of Oklahoma, a short distance southerly of the Arkansas River, between the said stations of Verdark and Muskogee, in said State of Oklahoma, said train upon which said William B. West was so riding in the

performance of his duties as aforesaid, was by said defendant railroad corporation, through gross carelessness and negligence, upon its part, and while said train was running at a high and dangerous rate of speed, caused and allowed to collide in what is known as a head-end collision with a locomotive and freight train, also owned, maintained and operated by said defendant company, and which freight train was also then and there, through the gross carelessness and negligence of said defendant company, being run and operated by said defendant company upon the same track, in a northerly direction, at a high and dangerous rate of speed, and that said William B. West was, by said collision and by said gross carelessness and negligence on the part of said defendant railroad company, in causing and allowing said trains to be so run and operated upon the same track and to collide as aforesaid, and without any fault or neglect, whatsoever, upon the part of said William B. West, then and there caused to sustain and receive such personal bodily injuries as resulted in his immediate death.

"9. That the expectancy of life of said William B. West at the time of his death, according to the Carlisle tables of mortality, was twenty-nine and sixty-four one-hundredths years (29 64/100), and that at the time of his death, as aforesaid, said William B. West was but thirty-eight years of age and in good health of body and mind, and of strong physique and was well able to do great mental and manual labor, and to earn at least the sum of eighty-three and thirty-three one-hundredths dollars ($83 33/100) per month, at his business and employment as express messenger and baggageman as aforesaid, and that at said time was, in fact, actually earning and receiving from his said employment the sum of eighty-three and thirty-

three one-hundredths dollars ($83 33/100) per month, and that he would (except for his death so resulting from the neglect of said defendant) have continued to earn and receive a much larger sum per month, for at least the period of twenty-nine years (29) thereafter, and in the aggregate, at least the sum of thirty thousand dollars ($30,000), and that plaintiff herein, and her said children would have received for their own benefit, out of said moneys that said William B. West would have earned (except for his death as aforesaid) an amount in excess of twenty-five thousand ($25,000) dollars and that plaintiff and her said children have been damaged at the hands of defendant in the loss of the care, aid, advice and society of said William B. West as husband of plaintiff and father of said children in the further sum of at least twenty-five thousand ($25,000) dollars."

The defendant demurred to plaintiff's petition, on the grounds, (1) no legal capacity to sue for the minor children named in paragraph three of said petition; (2) defect of parties plaintiff, in that the suit is brought in the name of Ivolue B. West as plaintiff, while in paragraph four of said petition it is stated that the suit was brought by the plaintiff for the benefit of herself and the minor children named in paragraph three of said petition; (3) facts sufficient to constitute a cause of action on behalf of the plaintiff not stated in the petition.

The demurrer having been overruled, and exceptions saved, the defendant answered, (1) denying any negligence on its part, but averring contributory negligence on the part of the intestate; (2) that the train described in the petition as "Number Five," or the "Katy Flyer," was an interstate train, engaged in the

movement of interstate commerce; (3) that prior to the time of the alleged injury in question, the said William B. West had made application to the American Express Company in writing for employment by it as driver of one of its wagons at Parsons, Kansas, and was so engaged pursuant to the terms of a written contract, said contract being dated January 9, 1893. Said contract is in part as follows:

"Whereas, I, the undersigned, have entered, or am about to enter, the employ of the American Express Company, and in the course of such employment may be required to render services in the care, carriage or handling of merchandise and property in the course of transportation by cars, vessels and vehicles belonging to the different railroad, stage and steamboat lines upon which the company relies for its means of forwarding property delivered to it to be forwarded;

"And whereas, such express company, under its contracts with many of the corporations and persons owning or operating such railroad, stage and steamboat lines, is or may be obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employes;

"Now, therefore, in consideration of the premises and of my said employment, I do hereby assume all risk of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel or vehicle, or of any employe of any such corporation or person, or otherwise, and whether resulting in my death or otherwise.

"And I do hereby agree to indemnify and save harmless the American Express Company of and

from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made of may hereafter make, arising out of any claim or recovery upon my part, or the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence of any person or corporation, or of any employe of any person or corporation, or otherwise.

"And I hereby bind myself, my heirs, executors and administrators, with the payment to such express company, upon demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

"I do further agree that in case I shall at any time suffer any injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning and operating the railroad, stage or steamboat line upon which I shall be so injured, a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury, or connected with or resulting therefrom.

"I do hereby ratify all agreements heretofore made by said Express Company with any corporation or persons operating any railroad, stage or steamboat line in which such Express Company has agreed in substance that its employes shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every of such agreements in so far as the provisions thereof relative to injuries sustained by employes of the company are concerned, as fully as if I were a party thereto.

"And I do hereby authorize and empower said Express Company, at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine, with any corporations or persons operating any railroad, stage or steamboat line, **for my transportation as a messenger or employe free of charge** (bold-face type ours), upon the condition and consideration that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporations or persons, or of any employe of such corporations or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me.

"And I do hereby further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation, and to all persons upon whose railroad, stage or steamboat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons."

That the intestate, prior to the time of the alleged injury in question, made application to the American Express Company in writing for employment by it as an express messenger, and that pursuant to said application he was, prior to and at the time of the alleged injury in question, employed by the said American Express Company, under a contract in writing between him and said company, which contract was dated October 15, 1896, a copy of which is attached to said answer as a part thereof, as "Exhibit B". This contract also includes as a part of its provisions the contract hereinbefore designated and referred to as "Exhibit A".

It is pleaded that by the terms of said contract identified as "Exhibit B" it was provided that in consideration of the premises and of the employment of deceased, he did assume all risk of accident and injury which he should meet with or sustain in the course of his employment, whether occasioned or resulting by or from the gross or other negligence of said corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employe of any such corporation or person, or otherwise, and whether resulting in his death or otherwise. Said contract referred to as "Exhibit A" is in part as follows:

> "Whereas, I, the undersigned, have entered, or am about to enter, the employment of the American Express Company, and in the course of such employment may be required to render services in the cars, carriage or handling of merchandise and property in the course of transportation by cars, vessels and vehicles belonging to the different railroad, stage and steamboat lines upon which the company relies for its means of forwarding property delivered to it to be forwarded;
>
> "And whereas, such Express Company, under its contracts with many of the corporations and persons owning or operating such railroad, stage or steamboat lines, is or may be obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employes;
>
> "Now, therefore, in consideration of the premises and of my said employment, I do hereby assume all risk of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any

railroad or vessel, or vehicle, or of any employe of any such corporation or person, or otherwise, and whether resulting in my death or otherwise.

"And I do hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation, or person under any agreement which it has made, or may hereafter make, arising out of any claim or recovery upon my part, or the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence of any person or corporation, or of any employe of any person or corporation, or otherwise.

"And I hereby bind myself, my heirs, executors and administrators with the payment to such express company, upon demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

"I do further agree that in case I shall at any time suffer any such injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning or operating the railroad, stage or steamboat line upon which I shall be so injured, a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury, or connected with or resulting therefrom.

"I do hereby ratify all agreements heretofore made by said express company with any corporation or persons operating any railroad, stage or steamboat line in which such express company has agreed in substance that its employes shall have no cause of action for injuries sustained in the course of their employment upon the line of such

contracting party, and I agree to be bound by each and every of such agreements in so far as the provisions thereof relative to injuries sustained by employes of the company are concerned, as fully as if I were a party thereto.

"And I do hereby authorize and empower said express company, at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine, with any corporation or persons operating any railroad, stage or steamboat line, for my transportation as a messenger or employe free of charge, upon the condition and consideration that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporations or persons, or of any employe of such corporations or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me.

"And I do hereby further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation, and of all persc upon whose railroad, stage or steamboat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons.

"I do further agree, in consideration of my employment by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said company or any of its members, officers, agents, or employes, or otherwise; and that in case I shall at any time suffer any such injury I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of

all claims, demands and causes of action arising out of such injury or connected therewith, or resulting therefrom; and I hereby bind myself, my heirs, executors and administrators with the payment to said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith."

It is further recited in the answer that:

"Defendant admits that at and prior to the death of the said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by the defendant railway company over its line of railroad between the City of Parsons, Kansas, through the State of Oklahoma, to points beyond in the State of Texas, and admits that the deceased, William B. West, in addition to his employment as express messenger by the said American Express Company, was also engaged in handling passenger baggage upon the express car of the said defendant railway company, and defendant railway company states that said William B. West, deceased, in performing said duties in handling said baggage, was doing so under and by virtue of his said employment by the said American Express Company, and that such handling of such baggage by said West was for and in behalf of and under the direction of said railway company."

Plaintiff replied that said contracts, identified as Exhibits A and B, were void; that "by virtue of the laws and statutes duly existing in the said State of Kansas, all railroad companies operating within said State of

Kansas were liable for all damages done to persons or property, if done in consequence of any negligence upon the part of said railroad companies, and by the laws and statutes of said State all contracts by which it was attempted to release any railroad company from such damages was void as being in violation of said laws and statutes and of the public policy of the State of Kansas, and that said laws and statutes ever since have and still do exist and are in force in said State of Kansas, and that said contract was wholly without consideration;

"That by reason of the existence of said laws and statutes and the want of consideration, aforesaid, the said pretended contract or the evidence thereof purporting to exist in Exhibits 'A' and 'B' attached to the answer of the defendant were and are wholly void and of no effect."

Defendant demurred to said reply, which was overruled and exceptions saved.

Defendant then filed a rejoinder to plaintiff's reply. On the issues thus made the cause was tried before a jury and a verdict returned in favor of the plaintiff in the sum of $15,000.

1. The plaintiff in error insists that the liability of the plaintiff in this case is controlled entirely by the Act of Congress commonly known as the "Employers' Liability Act", under which the only person entitled to sue is the personal representative of the deceased.

The Act of April 22, 1908 (35 U. S. Stat., p. 65; U. S. Comp. Stat. 1901, p. 1322), entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employes in Certain Cases", provides:

> "Sec. 1. That every common carrier by railroad, while engaging in commerce between any of the

several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats wharves, or other equipment."

Section 5 of said Act also provides:

"That any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void. *Provided*, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought."

Section 7 of said Act provides further:

"That the term 'common carrier' as used in this act shall include the receiver or receivers or other

persons or corporations charged with the duty of the management and operation of the business of a common carrier."

It is insisted that the intestate was not in the employ of the plaintiff in error, but in that of the American Express Company. Under the issues as framed, said intestate was an employe of the express company and not of the railroad company. This is not an action by the defendant in error against the American Express Company, the intestate's employer, in which event, if the express company comes within the term of a common carrier by railroad, the Act of Congress of April 22, 1902, would apply.

Plaintiff in error in its reply brief insists that under the pleadings it avers that defendant in error's intestate was an employe of the railway company. The defendant in error in her petition alleges as follows:

> "That in addition to his duties and employment as express messenger, as aforesaid, the said William B. West also engaged in handling passenger baggage upon the express cars of the defendant company."

In the third amended answer of the plaintiff in error, after admitting the truth of this allegation, the plaintiff in error further alleges that the deceased

> "was also engaged in handling passenger baggage upon the express car of the said defendant railway company, and the defendant railway company states that the said William B. West, deceased, in performing said duties in handling said baggage, **was doing so under and by virtue of his said employment by the said American Express Company** (bold-face type ours), and that such handling of

such baggage by said West was for and in behalf of and under the direction of said railway company."

The plaintiff in error thereby expressly adopting the terms of said employment by the American Express Company, which was in writing, said contracts in writing being attached to the answer as exhibits, and which show that the defendant in error's intestate was an employe of the American Express Company, and not of the railway company.

There is no dispute but that the intestate handled express and baggage between points in one State, and also between points in one State and points in another State, but, in doing this, under the pleadings in this record, he was the employe of the express company and acting for the express company in handling such baggage. Obviously, this was done by virtue of a contract between the express company and the railway company, but the railway company neither saw fit to plead this contract nor to offer it in evidence, and the presumption is that had proffer been made of this contract it would have been against the contention of the plaintiff in error.

Paragraph 2 of the syllabus in A. T. & S. F. Ry. Co. v. Davis & Young, 26 Okla. 359, 109 Pac. 551, is as follows:

> "When it is reasonably within the power of a party to offer evidence upon the facts and rebut the inferences which the circumstances tend to establish against him, and he fails to offer such proof to rebut same, the natural conclusion is that the proof, if produced, would support the inferences against him, and the jury is justified in acting upon that conclusion."

Nowhere in this record is any offer made to produce this contract or to show what the contract was. On the contrary, it appears from the record that the Railway Company sought to prove by circumstances what such contract was, without showing the contract or proving its contents. This of itself would indicate that if this contract were in evidence it would be fatal to their contention. However, the evidence offered for the purpose of showing that the defendant in error's intestate was an employe of the plaintiff in error, which was excluded by the Court, is not properly presented under the rules of this Court here for review.

Rule 25 is as follows:

> "* * * The brief shall contain the specifications of the errors complained of, separately set forth and numbered; * * *"

The specifications of error in the brief of plaintiff in error are set out, beginning with page 71 and ending with page 81. Specifications of error numbered 2. 3 and 4 relate to the rejection of evidence. Specification No. 2 is as follows:

> "The trial court erred in refusing to admit in evidence the application for a situation of William B. West with the Express Company, which application contained the accident release executed by the said William B. West, the benefits of which inured to this plaintiff in error. Said application for situation and accident release being marked 'Defendant's Exhibit A'."

Specification No. 3 is as follows:

> "The trial court erred in refusing to admit in evidence the application for a situation of William B. West with the Express Company, which appli-

cation contained the accident release executed by the said William B. West, the benefits of which inured to this plaintiff in error. Said application for situation and accident release being marked 'Defendant's Exhibit B'."

Specification No. 4 is as follows:

"The trial court erred in refusing to admit in evidence the application for a situation of William B. West with the Express Company, which application contained the accident release executed by the said William B. West, the benefits of which inured to this plaintiff in error. Said application for situation and accident release being marked 'Defendant's Exhibit C'."

No specifications of error having been predicated upon the exclusion of any other evidence tending to show that defendant in error's intestate was an employe, the same is not properly before this Court for review, and for that reason we do not consider the same; for the further reason in the brief and argument of plaintiff in error, beginning with page 82 and ending with page 146, such is not attempted to be insisted upon or urged as error.

In Noble State Bank v. Haskell *et al.*, 22 Okla. 48, 97 Pac. 590, paragraph 7 of the syllabus is as follows:

"When the brief of the plaintiff in error, in any civil cause, fails to preserve, by specification of error, any point complained of in the lower court, such question is thereby waived in this court."

In addition to that, in the brief and argument the point is not urged, and the same cannot be cured by a reply brief when the same is not predicated upon a specification of error, permission not having been first

obtained for the purpose of amending the specifications of error. No such permission has been asked for or granted in this cause.

Under the issues as made, section 5945, Comp. Laws 1909 (Sec. 4313, Stat. Okla. Ter. 1893) applies. Said section is as follows:

> "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

Section 5946, Comp. Laws 1909 (section 4314, Stat. Okla. Ter. 1893; section 4612, Wilson's Rev. and Ann. St. 1903) provides:

> "That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in section 5945 of this article, is or has been at the time of his death in any other State or Territory, or when, being a resident of this State, no personal representative is or has been apointed, the action provided in said section 5945 may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

In the petition it is averred that the accident occurred in the State of Oklahoma; that the intestate at that time resided at Parsons, in the State of Kansas. The evidence in the record supports such averment.

The action appears to have been properly brought. Okla. Gas & Electric Co. v. Lukert, 16 Okla. 397.

The limitation of section 5945, *supra*, was removed by Section 7, Article 23, of the Constitution, which provides:

> "The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

Sections 5945 and 5946, as modified by section 7, article 23, *supra*, were brought over by section 2 of the Schedule to the Constitution. Tilley v. Overton, 29 Okla. 292, 116 Pac. 945; Olson v. Logan County Bank, 29 Okla. 391; Mayor and Councilmen of City of Pawhuska v. Pawhuska Oil & Gas Co. *et al.*, 28 Okla. 563, 115 Pac. 353; *Ex parte* McNaught, 23 Okla. 285; *Ex parte* Cain, 20 Okla. 125.

Under the undisputed evidence in the record the American Express Company paid the intestate his salary, the Railway Company paying the Express Company for the handling of the baggage.

In Sewell v. A., T. & S. F. Ry. Co., 78 Kan. 17, in the opinion on rehearing, it was held:

> "In view of the Kansas statutes making a railroad company liable for all damages done to persons or property in consequence of any neglect on its part (Gen. Stat. 1901, Sec. 5857), and for all damages done to any of its employes in consequence of any negligence of its agents or by any mismanagement of its engineers or other employes (Gen. Stat. 1901, Sec. 5858), although an express company contracts with the railway company by means of whose trains it carries on its business that it assumes all risk of injury to its employes

and undertakes to save the railway company harmless from any claims with respect thereto, and contracts with one of its employes that neither it nor the railway company shall be liable to him for any injury occurring to him while traveling on any of such trains in the course of such employment, such employe may still maintain an action against the railway company for injuries received while so traveling in consequence of the negligence of its agents."

Under the laws of Kansas, as construed in said case by the highest court of that State, such contracts with the Express Company did not prevent the widow of the intestate from suing the Railroad Company for damages on account of his death.

It is not essential to determine whether the law of the place where said contract was entered into or the place where the injury occurred applies.

Section 36, Article 9, of the Constitution of this State, known as the Fellow Servant Act, defines the rights of the employes of railway companies in this State, at least as to intrastate matters.

By section 13 of article 9, the plaintiff in error is permitted to issue or give a free pass or free transportation, for use within this State, to defendant in error's intestate as an expressman. By section 8, article 23, said intestate was not permitted, by any contract or agreement, express or implied, to waive a right to recover for negligence as a passenger thereon by virtue of such free pass, for, by sections 2 and 6 of article 9, the plaintiff in error is made a common carrier and a public highway, and thereby owed the defendant in error's intestate certain duties as a passenger, though he be traveling on free transportation. (See, also, Sec. 6, Art. 23.) In addition to that, it is

the decidedly prevailing doctrine in this country that a passenger carrier cannot contract against the consequences of his own negligence when the carriage of the passenger himself is the subject of the contract. 2 Hutchinson on Carriers, 3rd Ed. (Matthews and Dickinson), section 1072, page 1245, and authorities cited in foot note 47.

In either event, this contract is void as against public policy, on account of being in contravention of the laws of the State of Kansas and against the public policy of this State. (Secs. 1123 and 1124, Comp. Laws 1909.)

2. The Court instructed the jury as follows:

> "You are instructed that it is the duty of a railway company to so conduct, maintain and run its trains used in its business in such a manner as to prevent injury to persons riding on said trains."

The undisputed evidence in this case shows that the Railroad Company was guilty of negligence. If such instruction was error, it would be without prejudice. St. Louis, I. M. & S. Ry. Co. v. Sweet, 60 Ark. 550, 31 S. W. 571.

3. It is contended that the Court erred in excluding the two contracts heretofore referred to as "Exhibit A" and "Exhibit B". In view of the conclusion hereinbefore reached, such action was without error.

4. Is the amount of damages awarded in this case excessive?

The plaintiff in error requested the Court to charge the jury as follows:

> "If you should find for the plaintiff your verdict should be for such amount as would compensate the plaintiff for the financial loss sustained,

and you are not to permit your sympathy to influence your verdict. The plaintiff is not entitled to recover for loss of the society of deceased nor for mental anguish. Your verdict must be based upon the financial loss in dollars and cents."

This instruction was refused, to which plaintiff in error excepted.

The Court instructed the jury as follows:

"If you find for the plaintiff in this case, then in assessing the damages which she is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the widow and children of the deceased, and, determining this, you may consider the probable earnings of the deceased, his age, experience, habits, health and bodily qualifications, during what would probably have been his lifetime, if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition."

It is insisted by the plaintiff in error that said instruction is deficient in two particulars, to which attention of the Court was directed in requested instruction number 7, namely, that the plaintiff was not entitled to recover for the loss of the society of the deceased, nor for mental anguish. It would have been better practice for the Court to have given this instruction. However, the instruction given, as to what was permitted to be included in pecuniary damages, seems to have been more favorable to the plaintiff in error than it was entitled to. The setting out in detail the elements of pecuniary damages to be considered by the jury in assessing the damage, in the event they

found for the plaintiff, did not include loss of the society or mental anguish on account of the death of the intestate. The expressing in detail of the elements of pecuniary damage to be considered by the jury, excluded from their consideration all other elements of damage. Where an instruction reasonably and fairly presents an issue, a cause will not be reversed by this Court because an instruction presenting the issue in another form was refused by the lower court.

As a matter of practice, however, trial courts should be careful in refusing instruction. When the trial court has given an instruction which covers the issue, on the theory that the expression of the one excludes the other, and a party to the suit asks an instruction which would expressly exclude such matters from the consideration of the jury which were by implication excluded in the general charge, the trial court, as a matter of precaution, should grant such instructions. For, in matters as to excessive verdicts, such a state of the record might be presented as to create such doubt as to constrain the reviewing court to reach the conclusion to a reasonable certainty that the verdict was excessive.

If trial courts, as well as the attorneys seeking verdicts in such courts, will co-operate and exercise more care in trying cases to the end that no prejudicial error shall be committed, there will be fewer reversals. If attorneys would show the same zeal in the trial court to try a case so there would be no prejudicial or reversible error as they frequently do to sustain cases on appeal, where, on account of laches or want of care, they have permitted or caused to creep into the record doubtful questions of error, there would be fewer reversals by appellate courts. If the rule to so con-

duct the case as to reasonably recover without any error being committed in the trial, rather than the rule to win a verdict in the heat of the trial battle, without regard to the consequences on appeal, were more considered, appellate courts would be greatly aided.

In 4 Sutherland on Damages, Third Edition, section 1262, it is said:

> "There is no dissent in the English decisions made since 1852 from the rule that damages cannot be awarded for mental suffering or loss of society, but must be restricted to pecuniary loss. The language of Lord Campbell's act on this point is: 'The jury may give such damages as they may think proportionate to the injury resulting from such death to the parties respectively for whom or for whose benefit such action shall be brought.' Its title is 'an act for compensating the families of persons killed'. It also provides that the amount recovered shall be divided amongst the parties mentioned in it in such shares as the jury by their verdict shall find and direct. These provisions in it and the difficulty of apportioning the damages for *solatium* materially influenced the Court in reaching the conclusion that only pecuniary losses are within the intent of the law."

The Canadian authorities are divided on this question. St. Lawrence, Etc., R. v. Lett, 11 Can. Sup. Ct. 422; Lett v. St. Lawrence, Etc., R., 11 Ont. App. 1, 1 Ont. 545; Canadian Pacific R. Co. v. Robinson, 14 Can. Sup. Ct. 105.

In New Zealand the English rule also prevails. Greymouth-Point Elizabeth R. & C. Co. v. McIvor, 16 N. Z. L. R. 258.

In James v. Richmond & Danville Railroad Co., 92

Ala. 231, in an opinion by Chief Justice Stone, it is said:

> "What is known in England as Lord Campbell's Act—9 and 10 Victoria—was followed on this side of the Atlantic with legislative enactments on the same subject, by many State legislatures. Most of the statutes in America, which go into particulars, enumerate substantially the same descriptions of tort, whether of commission or of negligent omission, as did Lord Campbell's Act, in declaring the grounds on which this new statutory remedy may be successfully invoked. This has given rise to the phrase, found in many of the reported cases and text-books, that statutes in this country are substantial copies of their English predecessor. It has been used by this court. M. & M. Railway Company v. Holborn, 84 Ala. 133. The remark is true, so far as the several States assume to define the wrongs, for which they provide a mode of redress. That was the question in Holborn's case.
>
> "In declaring and defining the persons entitled to the benefit of the recovery, in cases in which death ensues from the injury complained of, the English statute has this language: 'That every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury, resulting from such death, to **the parties respectively for whom and for whose benefit** such action shall be brought.' (The black-face type is ours.) This statute expressly directs the inquiry of damages, not to the injury, suffering or loss sustained by the deceased

in the loss of life, but confines it to the injury suffered by the parties for whose benefit the suit is brought, namely, 'the wife, husband, parent, child' or the deceased, as the case may be."

The question of recovery for the pain and suffering of the intestate is neither involved in this proceeding. A. T. & S. F. Ry. Co. v. Rowe, 56 Kan, 411. Sections 5945 and 5946, *supra*, having been taken from Kansas, the construction by the highest court of that State prior to the time of their adoption by the Legislature of the Territory of Oklahoma, is binding on this court. Farmers State Bank v. Stephenson *et al.*, 23 Okla. 695; State *ex rel.* v. Cullison, Judge, 31 Okla. 187, 120 Pac. 660. The damages recoverable under said sections have reference to a pecuniary loss. St. Joseph & Western R. Co. v. Wheeler, 35 Kan. 185; A. T. & S. F. Ry. Co. v. Weber, 33 Kan. 543; C. K. & W. R. Co. v. Bockoven, 53 Kan. 279.

See, also, Tilley v. Hudson River R. R. Co., 44 N. Y. 471; Telfer v. Northern R. R. Co., 30 N. J. Law 188; Safford v. Drew, 3 Duer. 627; Chicago & R. I. Railroad Co. v. Morris, 26 Ill. 400; Ill. Cen. Railroad Co. v. Weldon, 52 Ill. 290; City of Chicago v. Scholton, 75 Ill. 468; Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205; Kesler v. Smith, 66 N. C. 154; Baltimore & O. R. Co. v. State, use of Kelly *et al.*, 24 Md. 271; Penn. R. R. Co. v. McClaskey, 23 Pa. St. 526; Same v. Vandever, 36 Pa. St. 298; Same v. Butler, 57 Pa. St. 335; Same v. Goodman, 62 Pa. St. 329; Johnson v. Cleveland & T. R. R. Co., 7 Ohio St. (N. S.) 336; N. & W. R. R. Co. v. Johnson, 38 Ga. 409; Rose v. Des Moines Valley R. R. Co., 39 Ia. 246; Orgal v. Chicago, B. & Q. R. Co., 46 Neb. 4; Louisville & N. R. Co. v. Orr, 91 Ala. 548, 8 So. 260; Bertha Geiger v. The Worthen & Aldrich Co., 66 N. J.

Law 576; Donaldson v. Miss. & Mo. R. R. Co., 18 Ia. 280; Nashville & C. R. Co. v. Stevens, 9 Tenn. 12; Long v. Morrison, 14 Ind. 595; Malott, Receiver, v. Shimer, Admx., 153 Ind. 35.

In Railway Company v. Maddry, 57 Ark. 306, in an opinion delivered by Mr. Justice Hemingway, it is said:

> "But while it is difficult, and may be impossible, to deduce from the authorities a uniform rule for determining what should, and what should not, be considered in estimating the damage in every case, a rule is deducible that favors the consideration of the loss of the mental, moral and physical training of the parent in a suit by his child. 3 Suth. Dam. (3d Ed.), Sec. 1267; 2 Sedg. Dam., Sec. 577; Wood's Mayne on Dam., p. 450; Tilley v. Hudson R. R. Co., 24 N. Y. 471; S. C. 29 N. Y. 282; McIntyre v. N. Y. C. R. Co., 37 N. Y. 287; Penn. R. Co. v. Goodman, 62 Pa. St. 329; Penn. R. Co. v. Keller, 67 Pa. St. 185; Balt. & Ohio R. Co. v. Wightman, 29 Gratt. 431; Board of Commissioners v. Legg, 93 Ind. 523; Stoher v. Ry., 91 Mo. 509; Searle v. Ry., 32 W. Va. 370; St. Lawrence R. Co. v. Lett, 11 Canada 422; Pym v. G. N. R. Co., 2 Best & Smith (Eng.) 759; Castello v. Landwehr, 28 Wis. 522; Ill. Cent. R. Co. v. Weldon, 52 Ill. 290.
>
> "It was said by counsel for defendant upon the argument that, though cases growing out of the death of the mother might be found to support the rule, none such growing out of the father's death could be found. This is a misapprehension as to the authorities, for we have cited several cases to support it, growing out of the father's death. And, besides, it seems plain that though there may be a difference in the degree of advantage to the child growing out of the service ordinarily performed by the mother and that by the father, there

can be none in kind; and if one is deemed as of pecuniary advantage, it seems to follow that the other would be held as of the same character.

"Upon the examination made by us, we find no case that antagonizes the rule stated, but we do find that in the cases that favor it there has not been entire unanimity among the judges. In the case of the St. Lawrence R. Co. v. Lett, 11 Can. 422, the Court approves the rule in an opinion that reviews the authorities, English and American, and sustains its conclusions by reasoning that we deem unanswerable; but in the report of the same case a dissenting opinion is found which maintains the contrary view with admirable force. We have not been able to disregard the persuasive effect of such a line of unconflicting decisions, or to discover that there is error in their conclusion. Its correctness depends upon the correctness of the following propositions: (1) That the age, observation and experience of the father fit him to assist in the physical, mental and moral training of his child; (2) that the natural affection of father for child affords a reasonable expectation that he will render the assistance that he reasonably can toward such training; and (3) that a proper development of the physical, mental and moral qualities of the child is of pecuniary value to him, either because it must otherwise be bought or because it is in aid in money getting in after life. It seems to us that neither of the propositions, having reference to men generally, can be questioned, if not it follows that the service of the father in training his child is of some pecuniary value, independent of what should never be considered—the happiness found in his love and companionship.

"Objections raised to this conclusion, as we understand them, are, not that the father's train-

ing is not a pecuniary advantage to the child, but that there are difficulties in the way of administering the rule that render it improbable that it was intended to prevail. The one most strongly urged is that there is no exact basis for estimating the value of the service lost; but this objection goes as well to the propriety of considering everything else that goes to show the value of the lost expectancy, and if it is to control the law would become valueless. To illustrate: Proof is made that a father was able, by his industry, to earn a stated sum, and this is considered in estimating the child's damage, upon the theory that the father would have lived out the average time of life, continued to receive the same sum and to appropriate it, in part at least, to those suing. The theory is destitute of an element of certainty, and is a compound of more or less remote probabilities. The father might not live the average term of life; or, if he did, might cease to earn money; and the child might die during his father's life, or, if he lived, might cease to receive aid from him, and be compelled to support him; or, if both should live out their expectancy, and the father continue to receive money and to apply it in part to the child, the number of persons interested in the father's life might increase, and the share of the child correspondingly diminish. In no event is it possible to determine with certainty that any pecuniary benefit would have continued to the child, or, if it did, what it would have amounted to if the father's life had continued, and all that can be attempted is to make an estimate upon disclosed probabilities. Upon the same basis an estimate can be made of the money value of the father's probable service and care in educating and training the child, for it is no less susceptible of precise calculation than the extent or value of future

receipts of property. Another objection is that the rule makes it to the interest of the defendant to show that the father was disqualified to train his child, and that it thereby instigates an unseemly and improper inquisition into the character of the dead; but this objection applies as well to considering his probable earnings. For it is equally as competent and important, in the latter case as in the former, for the defendant to rebut the probable expectancy of receiving money from the father by showing that he was idle, dissipated or thriftless and would probably have earned nothing, or that he was undutiful and would not have shared his earnings with his child.

"The Legislature must have known that the subject-matter of the act did not admit of precision, and that the wrongs it sought to remedy could not be accurately measured; it must have known also that, in awarding to the living their rights under the law, it might become material to expose the ignorance, immorality, idleness, thriftlessness or undutifulness of the dead; and as the law was passed in face of the difficulty and disagreeableness of administering it, it becomes the duty of the courts to attempt to administer it in accordance with its letter and intent."

This decision was concurred in by Cockrill, Chief Justice, and Battle, Hughes and Mansfield, Associate Justices.

See, also, St. Louis, I. M. & S. Ry. v. Sweet, 60 Ark. 550, 31 S. W. 571; St. Louis, I. M. & S. Ry. v. Haist, 71 Ark. 258, 72 S. W. 893; St. Louis, I. M. & S. Ry. v. Hitt, 76 Ark. 227, 88 S. W. 908; St. Louis & N. A. R. Co. v. Mathis, 76 Ark. 185, 91 S. W. 763, 113 Am. St. Rep. 85; St. Louis, I. M. & S. Ry. v. Standifer, 81 Ark. 275, 99 S. W. 81; Syas v. Southern Pac. Co., 140 Cal. 296, 73

Pac. 972; Johnson v. Southern Pac. R. R., 154 Cal. 285, 97 Pac. 520; Valenti v. Sierra Ry., 111 Pac. 95; Simoneau v. Pac. E. Ry., 115 Pac. 320; Anderson v. Great Northern Ry., 15 Ida. 513, 99 Pac. 91; Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562, 64 N. E. 110; Goddard v. Enzler, 222 Ill. 462, 78 N. E. 805; Sternfels v. Metropolitan St. Ry., 73 App. Div. 494, 77 N. Y. Supp. 309; International & G. N. Ry. v. McVey, 99 Tex. 28, 87 S. W. 328; Chicago, R. I. & T. Ry. v. Porterfield, 19 Tex. Civ. App. 225, 46 S. W. 919; Houston & T. C. R. R. v. Rutland, 45 Tex. Civ. App. 621, 101 S. W. 529; Gray v. Phillips, 117 S. W. 870 (Tex. Civ. App.); Wells v. Denver & R. G. W. Ry., 7 Utah 482, 27 Pac. 688; Chilton v. Union Pac. Ry., 8 Utah 47, 29 Pac. 963; Norfolk & W. Ry. v. Cheatwood, 103 Va. 356, 49 S. E. 489; Hoadley v. International Paper Co., 72 Vt. 79, 47 Atl. 169; Searle v. Kanawha & O. Ry., 32 W. 370, 9 S. E. 248; Walker v. McNeill, 17 Wash. 582, 50 Pac. 518; Duke v. St. Louis & S. F. R. R., 172 Fed. 684.

Contra: Walker v. Lake Shore & M. S. Ry., 111 Mich. 518, 69 N. W. 1114; Bradley v. Ohio River R. R., 122 N. C. 972, 30 S. E. 8; McCabe v. Narragansett E. L. Co., 27 R. I. 272, 61 Atl. 667.

But a child can recover for the loss of such advice only as would have had pecuniary value, in estimating which the age and situation of the parties is to be considered, and nothing can be included for the merely sentimental loss. Demarest v. Little, 47 N. J. L. 28; Gulf, C. & S. F. Ry. v. Finley, 11 Tex. Civ. App. 64, 32 S. W. 51; Felt v. Puget S. E. Ry., 175 Fed. 477.

There must be proof that the deceased was fitted by nature or education, or by disposition, to furnish to his children instruction, or moral, physical or intellectual training, in order for the jury to consider the

loss of instruction and moral training as an element of pecuniary damages. Ill. Cen. R. R. v. Weldon, 52 Ill. 290; Chicago, R. I. & P. R. R. v. Austin, 69 Ill. 426.

> "There is almost entire harmony in denying a recovery for the mental suffering of the beneficiaries of the deceased, or as a *solatium.*" 4 Sutherland on Damages, 3rd Ed., Sec. 1263, p. 3704, and authorities cited in footnote 2.

Having adopted the Arkansas rule as to the measure of damages in case of death, when there is no question as to recovery for physical pain and suffering, the holdings of the Supreme Court of that State as to what is an excessive verdict, our statutes being practically the same, are persuasive.

In St. Louis, I. M. & S. Ry. Co. v. Freeman, 89 Ark. 326, it is said:

> "It is contended that the verdict is excessive. Plaintiff's decedent was shown to have been twenty-four years of age, a man of good habits, healthy, intelligent and industrious. He left no children. The case was therefore stripped of all elements of damage except as to the amount of his probable contributions to those dependent upon him. The evidence tended to show a present earning capacity at the time of his death and contribution to his wife of $900 per annum. It tended to show also, and the jury were warranted in finding, that his earning capacity would probably have been increased—to what extent is a matter of speculation. It is shown that his wages had been increased from time to time, and that he was in line of promotion. According to the annuity tables, placing his contributions at $900 per annum, computing at the rate of 6 per cent per annum, the recovery would have been for $10,845. Making

due allowances for the probable increase in his earning capacity, we are of the opinion that the evidence is insufficient to sustain a verdict for more than $15,000."

See, also, Pulaski Gas Light Co. v. McClintock, 97 Ark. 576; Tiller v. Reynolds, 96 Ark. 358; St. Louis, I. M. & S. Ry. v. Raines, 90 Ark. 398; St. Louis & N. A. R. Co. v. Mathis, 76 Ark. 185, 91 S. W. 763; St. Louis, I. M. & S. Ry. Co. v. Caraway, 77 Ark. 405, 91 S. W. 749; St. Louis, I. M. & S. Ry. Co. v. Hitt *et al.*, 76 Ark. 227, 88 S. W. 908; St. Louis, I. M. & S. Ry. Co. v. Sweet, 60 Ark. 550, 31 S. W. 571.

In St. Louis, I. M. & S. Ry. Co. v. Freeman, *supra*, only the widow survived, and, consequently, the element of pecuniary damages for the loss of the instruction, moral, physical and intellectual training or advice to the children, on the part of the parent, could not be considered in sustaining a verdict for $15,000. There the intestate was twenty-four years of age; here he is thirty-eight years of age, but in good health, of both mind and body, of strong physique, already having advanced his earnings four times, at the time of his death receiving $83.33 per month. He was of good habits, industrious, ambitious and attentive to his family, and gave all of his earnings to his family except his personal expenses, not exceeding five dollars per month. He had been married about seventeen years and left surviving him three children, a girl about sixteen years of age, a boy about seven, another girl about two years of age, and a postumous child, born about six weeks after the intestate's death.

When we consider the element of pecuniary damages as hereinbefore set out, we believe that the $15,000 judgment rendered in this case should be sustained.

Whilst the verdict may probably be on the maximum border line, yet we believe that all intendments permitted by the record to be drawn against the plaintiff in error, when so found by the jury, reasonably sustain the verdict.

5. As to the specification of error predicated upon the court's instructing the jury that three-fourths of their number could return a verdict, this contention is without merit. Section 19, Article 2 (Bill of Rights), Constitution; running section 27 (Williams' Ed.) and citations; St. Louis & S. F. R. Co. v. Rushing *et al.*, 120 Pac. 973.

The judgment of the lower court is affirmed.

All the Justices concur (Rec., pp. 338-362).

In the Supreme Court of the State of Oklahoma.

Missouri, Kansas & Texas Railway Company,
Plaintiff in Error,
vs.
Ivolue B. West,
Defendant in Error.
No. 1928.

1. In an action brought by a widow under a state statute against a railway company for damages for injury suffered by her husband which resulted in his death, the petition alleged that the deceased was employed by the American Express Company as an express messenger; that in addition to his duties as an express messenger, he handled the personal baggage of the inter and intrastate passengers of the railway company which was engaged in interstate commerce. The answer of the defendant admitted the foregoing allegations and further alleged that the deceased "in performing said duties in handling said baggage was

doing so under and by virtue of his said employment by the said American Express Company". *Held*, that the pleadings disclose that the deceased, a resident of the State of Kansas, suffered the injuries which resulted in his death while he was employed by the American Express Company as an express messenger and not while he was employed by the railway company in interstate commerce, and that the action was properly brought by the widow under the state law.

2. Evidence on the question of employment examined and held not to be in conflict with the allegations contained in the petition, the admissions of the answer or the evidence of the plaintiff to the same effect. That said evidence, construed as a whole and in connection with the pleadings, merely supplements the admissions of fact contained in the pleadings by disclosing that the deceased received his entire salary for all the work performed by him from the express company; and that he was rightfully upon the train of the railway company by virtue of an arrangement between the two companies whereby in consideration of the work performed for the express company in handling baggage, the railway company agreed to pay to the express company one-half the sum so paid.

3. An express messenger, employed and paid solely by an express company and entitled under an arrangement between the express company and a railway company to ride on the trains of the railroad company in discharge of his duties, is a passenger while on such train in the discharge of his duties and entitled to the same degree of protection.

4. The contracts of employment containing waiver clauses offered in evidence by the defendant were properly excluded: (1) Because it was not clearly

shown that the contracts covered the employment in which the decedent was engaged at the time of his death; (2) the waiver clauses are void under the laws of the State of Kansas where said contracts were executed; (3) the waiver clauses are void under Sections 7 and 8, Article 23, Williams' Const., which provide:

> "Sec. 7. The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation.
>
> "Sec. 8. Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void."

5. By Sec. 2907, Comp. Laws, Okla. 1909, the measure of damages for the breach of an obligation not arising from contract is the amount which will compensate for all the detriment proximately caused thereby.

6. The Court gave the following instruction: "If you find for the plaintiff in this case, then in assessing the damages which she is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the widow and children of the deceased, and in determining this, you may consider the probable earnings of the deceased, his age, experience, habits, health, and bodily qualifications, during what would probably have been his lifetime, if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition." *Held*, not error.

7. The Court below refused to give the following instruction: "If you should find for the plaintiff your

verdict should be for such amount as would compensate the plaintiff for the financial loss sustained, and you are not to permit your sympathy to influence your verdict. The plaintiff is not entitled to recover for loss of the society of deceased nor for mental anguish. Your verdict must be based upon the financial loss in dollars and cents." *Held*, not error.

8. In order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct, both in form and in substance, and such that the Court might give to the jury without modification or omission. If the instruction as requested is objectionable in any respect its refusal is not error.

9. The amount of damages recoverable in actions for death by wrongful act is peculiarly a question for the jury; and the general rule is, that the verdict of the jury will not be reversed on the ground that the damages are excessive, unless the damages are so large as under the circumstances to check the sense of justice or to indicate that they were the result of prejudice and passion on the part of the jury.

10. The instructions given by the court below correctly confined the amount of recovery to the pecuniary loss sustained by the widow and children of the deceased. In our judgment, there is sufficient evidence in the record to sustain the verdict of the jury under the most limited interpretation that can be placed upon the instruction given.

(Syllabus by the Court.)

Appeal from the District Court of Muskogee County.

John H. King, Trial Judge.

Affirmed on Rehearing.

Clifford L. Jackson, W. R. Allen (M. D. Green on brief), attorneys for plaintiff in error.

Chas. H. Taylor, S. Grant Harris (St. Paul, Minn.), (Benj. Martin and Jas. D. O'Brien on brief), attorneys for defendant in error.

OPINION OF THE COURT.

KANE, J.:

This was an action for damages for personal injuries resulting in death, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. The deceased was the husband of the plaintiff and the injury which resulted in his death was occasioned by a collision between passenger train No. 5, commonly called the "Katy Flyer", and freight train No. 34. The primary cause of the collision was the violation of a dispatcher's train order by train No. 34, whereby the freight train, which was northbound, departed from the yards at Muskogee ahead of time and on the time of the southbound passenger train with which it collided. The collision occurred on the main line of the Missouri, Kansas & Texas Railway Company in Oklahoma, at a point between two and three miles north of Muskogee and just south of the Arkansas River. There was no dispute as to the collision, the cause of it, or that it resulted in the death of Mr. West, the husband of the plaintiff. The deceased and the plaintiff were residents of the State of Kansas. No personal representative was appointed and this action was commenced by the widow in her own name for the

benefit of herself and four minor children, the fruit of her marriage with the deceased, under a State statute which provides for such actions. It is alleged in the petition that "at and prior to the time of the death of said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by said defendant company over its said line of railroad between said City of Parsons, Kansas, through the State of Oklahoma to points beyond in the State of Texas; that in addition to his duties and employment as express messenger, as aforesaid, said William B. West also engaged in handling passenger baggage upon the express cars of said defendant company". The answer of the defendant was, (1) a general denial; (2) that even if the deceased was injured and killed at the time and place and in the manner alleged in the petition, that his injuries and death were not due to any negligence on the part of the defendant; and (3) that the defendant is a common carrier engaged in commerce between the several States; that the passenger train described by plaintiff in said petition as the "Katy Flyer" was at all times mentioned therein an interstate train, engaged in the movement of interstate commerce, and that said freight train, starting from Muskogee in the State of Oklahoma and proceeding on its line of railway to Parsons, in the State of Kansas, was at all times mentioned in plaintiff's petition engaged in moving interstate commerce.

The three succeeding paragraphs of the answer referred to three separate contracts of employment, which it is alleged were made and entered into by and between the deceased and the American Express Company, the first two being executed in 1893, and the third

in 1896. It is then alleged in effect that by the terms of said contracts it is provided that in consideration of the premises and of the employment of the deceased by the express company, he was to assume all risk of accident and injury which he should meet with or sustain in the course of his employment whether occasioned or resulting by or from the gross or other negligence of the railway company upon whose lines his duties were to be performed, and whether resulting in his death or otherwise. That in case of any injury suffered by deceased, he would at once, without demand, and at his own expense, execute and deliver to the corporation or person owning or operating the railroad, stage or steamboat line upon which he should be so injured, a good and sufficient release under his hand and seal of all claims, demands and causes of action arising out of such injury or connected with or resulting therefrom, etc. The answer closes with the following averment:

> "Further answering, defendant admits that at and prior to the death of the said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by the defendant railway company over its line of railroad between the City of Parsons, Kansas, through the State of Oklahoma, to points beyond in the State of Texas, and admits that the deceased, William B. West, in addition to his employment as express messenger by the said American Express Company, was also engaged in handling passenger baggage upon the express cars of the said defendant railway company, and defendant railway company states that said William B. West, deceased, in performing said duties in handling said baggage, was doing so under and by

virtue of his said employment by the said American Express Company, and that such handling of such baggage by said West was for and in behalf of and under the direction of said railway company."

The reply in effect denied each and every allegation in the answer contained, save as in the petition stated, or as hereinafter admitted, stated or qualified, and alleged that if the instruments mentioned in the answer were ever signed by William B. West, they were so signed and entered into in the State of Kansas during the years 1893 and 1896, and that by virtue of the laws of the State of Kansas, and for want of consideration said pretended contracts, or the evidence thereof purporting to exist in Exhibits A and B attached to the answer of the defendant were and are wholly void and of no effect. To this reply the defendant filed a general denial. Upon the issues thus joined, the cause was tried to a jury, which returned a verdict in favor of the plaintiff in the sum of $15,000, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

By a former opinion of this Court, the judgment of the court below was affirmed, and the cause is now before us upon a rehearing. The cause was ably and fully briefed and argued orally upon the original submission and again upon rehearing by counsel for both sides. After a careful re-examination of the record and briefs and the points presented by counsel in their oral arguments, we are still of the opinion that the conclusion formerly reached is correct. The assignments of error may all be grouped under the following heads: (1) The defendant in error herein is not the proper party to maintain this action; (2) error of the court

below in giving certain instructions and refusing to give certain instructions which presented the same issue in another way; (3) the trial court erred in declining to admit in evidence the three written contracts attached to the answer pertaining to the employment of the deceased by the express company; (4) the amount of damages awarded is excessive.

The first assignment is based upon the theory that the pleadings and evidence show that the deceased suffered the injury which resulted in his death while he was employed by the railway company in commerce between the States within the meaning of the Act of Congress relative to the liability of common carriers by railroad to their employes in certain cases, and therefore the cause of action accrued to the personal representative of the deceased for the benefit of the surviving widow and children. This contention cannot be sustained. It is specifically alleged in the petition that the deceased "was employed by the American Express Company as an express messenger". This is the only allegation to be found in the petition that attempts to state specifically by whom the deceased was employed, and there are no allegations elsewhere in the petition which necessarily negative that positive statement, or from which it may be reasonably inferred that the deceased was also employed by the railway company. But if the clear meaning of the specific allegation of the petition upon that point was clouded by the allegation which immediately follows it, to the effect that the deceased was also engaged in handling passenger baggage upon the express car of said defendant railway company, the answer of the defendant makes the situation entirely clear. In its answer the defendant, by way of admission, uses the language of the petition,

"that at and prior to the time of the death of said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by the defendant railway company over its line of railroad between the City of Parsons, Kansas, through the State of Oklahoma, to points beyond in the State of Texas, and admits that the deceased, William B. West, in addition to his employment as express messenger by the said American Express Company, was also engaged in handling passenger baggage upon the express car of the said defendant railway company", and immediately adds, "and defendant railway company states that said William B. West, deceased, in performing said duties in handling said baggage, was doing so under and by virtue of his said employment by the said American Express Company."

The foregoing admissions are in entire harmony with the balance of the answer, which contains allegation after allegation positively stating that the deceased was employed by the Express Company continuously for a great many years prior to his death, and the contracts of employment between the Express Company and the deceased are attached to the answer and made a part thereof, and certain waivers contained therein are relied upon as a defense.

From the pleadings alone it is clear that the deceased suffered the injuries which resulted in his death while he was employed by the Express Company, and not while he was employed by the Railway Company; and that the parties did not attempt to join an issue of fact upon that question. Counsel for the Railway Company seem to base their contention on this point, solely upon the theory that the allegation

to the effect that the deceased was also engaged in handling personal baggage in addition to his duties as express messenger is sufficient to create the presumption that he was jointly employed by the Railway Company, and cites M., K. & T. Ry. Co. v. Reasor (Tex.), 68 S. W. 332; Vary v. C. B. R. & M. Ry. Co., 42 Ia. 246, and Oliver v. Northern Pac. Ry. Co., 196 Fed. 432, as being authority to that effect. Those cases are so clearly distinguishable from the one at bar that we do not deem it necessary to notice them further than to say that in our judgment they are in no way in conflict with the conclusion herein reached. It is not disputed that the deceased handled interstate baggage, but the answer explains that in handling said baggage he was doing so under and by virtue of his said employment by said American Express Company. Moreover, there are no averments in the pleadings from which an inference may be reasonably drawn that any contract of employment was ever entered into between the deceased and the Railway Company.

The language of the Act of Congress carries with it the idea and the essence of a contract. To be employed by one is to be engaged in his service, to be used as an agent or substitute in transacting his business, to be commissioned and entrusted with the management of his affairs. In our judgment, the words, "while employed by such carrier", construed in connection with the context, is equivalent to "while hired by such carrier", which implies a request and a contract for compensation. The persons falling within the meaning of the act are those hired by the Railway Company, or those who are working for it at its request and under an agreement on its part to compensate them for their services. U. S. v. Nourse, Case No.

15901, 27 Fed. Cases; McCluskey v. Cromwell, 11 N. Y. 593; Bingham, Executrix, v. Scott, 117 Mass. 208. The case of the M., K. & T. Ry. Co. of Texas v. Blalack, 147 S. W. 559, is directly in point on the question now under consideration. In that case the railroad company pleaded that Blalack was in its employ at the time he was injured, but the only proof of employment was that Blalack handled baggage which was the work of an employe of the railway company. The Court said:

> "Where, in an action against a railroad company for negligent death, the evidence of plaintiff showed that decedent was an agent of an express company, employed and paid by it, and entitled to ride on the trains of the railroad company, under a contract between the two companies, and that the decedent was killed through the negligence of the employes in charge of the train, the railroad company, engaged in interstate commerce, must show that plaintiff's claim was unfounded, and that decedent was in its employ, to avail itself of the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. St. Supp. 1911, p. 1322); and where it failed to do so, the State law will govern the right to recover."

On rehearing it is contended that the evidence adduced at the trial disclosed that the injury was suffered while the deceased was employed by the Railway Company and that, even if no issue of fact on the question of employment was joined by the pleadings, the case as to parties must be governed by the Employers' Liability Act. It is familiar law that if, during the course of the trial it develops that the real case is not controlled by the State statute, but by the Federal statute, and the case is commenced under the

former, the case pleaded is not proved and the case proved is not pleaded. St. Louis & S. F. Ry. Co. v. Scales, 33 U. S. 351. But in our judgment, that rule is not applicable here. The evidence of Mr. Adams, an officer of the Express Company, relied upon by counsel, is in no way inconsistent with the allegations of the petition and the admissions of the answer, to the effect that the deceased was employed by the Express Company at the time of his death. It is true that Mr. Adams testified that the deceased "was a joint messenger and baggage man" and that "he worked for both companies" (which expressions under proper circumstances might be held sufficient to take the case to the jury on the question of employment. Ry. Co. v. Reasor, *supra*), but upon cross-examination it was clearly shown that the witness merely drew erroneous conclusions from admitted facts and that his testimony as a whole supplemented the allegations of the petition and the admissions of the answer by more fully disclosing the relations existing between the Express Company and the deceased, and the Express Company and the Railway Company, and made it more clearly apparent that the decedent was rightfully on the train. Construing the allegations of the petition, the admissions contained in the answer, and the evidence of Mr. Adams together, a state of facts is disclosed almost identical with that in the Blalack case, *supra*. From a careful investigation of the entire record, we are persuaded that if we should reverse the judgment of the court below upon the ground that the deceased suffered the injuries which resulted in his death while he was employed by the Railway Company, we would compel the widow to abandon the tenable theory upon which she brought the case and to ac-

cept one less advantageous to her and her children and one which it would be difficult, if not impossible, to establish.

We, therefore, find with the court below that the pleadings and the evidence conclusively show that the deceased suffered the injuries that resulted in his death while he was employed by the Express Company, and not while he was employed by the Railway Company in interstate commerce within the meaning of the Federal Employers' Liability Act. It follows that under the issues joined and the evidence adduced the action was governed by Sections 5945 and 5946, Comp. Laws Okla. 1909, as modified by Section 7, Article 23, Williams' Constitution. The first of these sections provides for an action for injury resulting in death by wrongful act, which must inure to the widow and children, if any, or next of kin; the second, that where the residence of the party whose death has been caused, as set forth in section 5945, is at the time of his death a resident of any other State or Territory and no personal representative has been appointed, the action provided for in said section may be brought by the widow. And the constitutional provision provides that,

> "The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

The second contention is predicated upon the following action of the Court: The Court instructed the jury as follows:

> "If you find for the plaintiff in this case, then in assessing the damages which she is entitled

to recover, the jury should assess the same with reference to the pecuniary loss, sustained by the widow and children of the deceased, and in determining this, you may consider the probable earnings of the deceased, his age, experience, habits, health and bodily qualifications, during what would probably have been his lifetime, if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition."

The plaintiff in error requested the Court to charge the jury as follows, which request was refused:

"If you should find for the plaintiff your verdict should be for such amount as would compensate the plaintiff for the financial loss sustained, and you are not to permit your sympathy to influence your verdict. The plaintiff is not entitled to recover for loss of the society of deceased nor for mental anguish. Your verdict must be based upon the financial loss in dollars and cents."

The principal ground of complaint as to the instruction given is that the term, "pecuniary loss", as used therein does not state with sufficient detail the specific elements of damage which the jury were permitted to take into consideration in assessing the amount of recovery. In our judgment, the instruction given is sufficiently clear to enable the jury to properly assess the damages, and is in accord with Sec. 2907, Comp. Laws, Okla. 1909, which provides that,

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this chap-

ter, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

Where the instruction given reasonably and farily presents the issue involved, the judgment of the court below will not be disturbed on appeal because a requested instruction which presented the same issue in another form was refused. Especially is this true when the instruction requested upon the same issue was less accurate in its statement of the law than the instruction given. The requested instruction was erroneous in several particulars. The first clause is misleading, for the reason that the statute upon which the action is based clearly provides and contemplates that the measure of damages shall be such amount as will fully compensate both the widow and the children, for whose benefit the action accrues. The first clause of the requested instruction is that the verdict of the jury should be for such an amount as would compensate the plaintiff for the actual loss sustained, and does not mention the children. The latter part of the instruction is also objectionable, for the reason it does not mention the right of the minor children to compensation for any pecuniary loss they may sustain in respect to the society of the father, as involved in the elements of fatherly care, advice and moral instruction and education. It is well settled that in order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct, both in form and in substance, and such that the Court might give to the jury without modification or omission. If the instruction as requested is objectionable in any respect its refusal is not error. A party cannot complain that the Court did not, of its own motion,

modify and correct the request and then give it as corrected. No such duty rests upon the Court. When a part only of a requested instruction is erroneous, the whole may properly be refused. Blashfield on Instructions to Juries, Sec. 137.

The third assignment of error arises out of the action of the Court in refusing to admit in evidence the contract of employment containing the waivers. We do not think the action of the court below in that regard was erroneous. In the first place, it is not clear that the contracts offered cover the employment in which the deceased was engaged at the time of his death. That would be a sufficient ground for excluding them. It also appears that the contracts were Kansas contracts. If we hold that they must be construed according to the laws of that State, we find that under the laws of Kansas, as construed by the highest court thereof, the waiver clause is held to be void. Sewell v. A., T. & S. F. Ry. Co., 78 Kan. 17. And if we hold that the contract is by its terms tied to the tort and the law of the place of the tort must govern (Smith v. A., T. & S. F. Ry. Co., 194 Fed. 79), as the cause of action arose since statehood, we must hold the waiver clause void under Section 8, Article 23, Williams' Constitution, which provides that,

> "Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void."

From an examination of the record, we are not prepared to say that the verdict is excessive. The amount of damages recoverable in actions for death by wrongful act is peculiarly a question for the jury, and the general rule is that the verdict of the jury will not be

reversed on the ground that the damages are excessive, unless the damages are so large as under the cricumstances to shock the sense of justice or to indicate that they were the result of prejudice and passion on the part of the jury. 8 Am. & Eng. Enc. of Law, 2nd Ed., pp. 912, 932.

Section 2907, Comp. Laws, Okla. 1909, provides that,

> "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

The instruction given by the court below correctly confined the amount of recovery to the pecuniary loss sustained by the widow and children of the deceased. In our judgment, there is sufficient evidence in the record to sustain the verdict of the jury under the most limited interpretation that can be placed upon the instruction given.

The evidence is to the effect that deceased was 38 years of age, in good health of body and mind, with an earning capacity of $83.33 per month at the time of his death; that his earning capacity steadily increased from the date of his employment by the Express Company to the time of his death, his salary having been advanced four times during that time. The evidence also showed that he was a man of good habits, industrious, ambitious, attentive to his family and that he contributed to the support of his wife and family all of his salary, except from $3 to $5 per month which he retained for his personal expenses. His expectancy of life was admitted to be 29.62 years. The family

consisted of a wife, two years younger than the deceased, and four minor children, one of whom was born after his death. Considering the education and clothing of the children and their increasing expense it may be reasonably inferred that each would fairly require its proportionate share of the earnings. There is evidence reasonably tending to show that the deceased would have apportioned among the members of his family a preponderating share of his salary. Upon the basis of an equal division, the widow and children would receive as their portion of his earnings the sum of $24,682.14 during his expectancy. This computation does not take into account what might have been saved from the earnings of deceased during his lifetime and made to produce interest, nor any damage occasioned to the children on account of loss, of mental, moral or physical training or advice of the father. It was shown that the cash earnings during the expectancy of the deceased at the rate proven would have reached approximately $30,000. We think that, in view of the large family entitled to support from the earnings, and the proven thrift, industry, frugality and advancement being made by the deceased at the time of his death, and his generous contributions to the support and maintenance of the wife and children, the verdict by the jury of $15,000, just one-half of the cash earnings of the deceased during his expectancy, is not excessive. The following are a few of the cases where substantial verdicts under somewhat similar circumstances have been sustained:

Louisville Ry. Co. v. Shivells (Ky.), 18 S. W. 944;

Redfield v. Oakland Consol. St. R. Co., 110 Cal. 277;

East Line, Etc., Ry. Co. v. Smith, 65 Tex. 167;

Reilly v. Brooklyn Heights R. Co., 65 N. Y. App. Div. 453;
St. Louis, Etc., Ry. Co. v. Cleere (Ark.), 88 S. W. 995;
Chesapeake, Etc., Ry. Co. v. Hendricks, 88 Tenn. 717;
M., K. & T. Ry. Co. v. Williams (Tex.), 117 S. W. 1043;
Harris v. Puget Sound El. Ry. Co. (Wash.), 52 Wash. 289;
M., K. & T. Ry. Co. v. McDuffey, 109 S. W. 1104;
Boyce v. N. Y. City Ry. Co., 110 N. Y. Sup. 393.

Finding no reversible error in the record, the judgment of the court below is affirmed.

All the Justices concur, except Dunn, J., absent (Rec., pp. 434-448).

INDEX TO REPLY BRIEF.

INDEX TO CASES REFERRED TO.

In the Supreme Court of the United States.

No. 696.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, NATIONAL SURETY COMPANY and AMERICAN SURETY COMPANY OF NEW YORK,

Plaintiffs in Error,

vs.

IVOLUE B. WEST,

Defendant in Error.

REPLY TO BRIEF OF PLAINTIFF IN ERROR IN ANSWER TO THE MOTIONS OF DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR OR AFFIRM THE JUDGMENT.

STATEMENT.

Counsel for Plaintiff in Error have interposed a Brief covering 112 pages in opposition to the Motion of Defendant in Error to dismiss or affirm.

The entire argument of Plaintiff in Error, however, is based upon the assumption that the express messenger was an employe of the Railroad Company by reason of his handling the passenger baggage.

This assumption is without any sufficient foundation in the record and is rendered impossible by the specific allegation of Plaintiff in Error in its Third Amended Answer wherein it

says: *"And Defendant Railway Company states that said William B. West, deceased, in performing said duties in handling said baggage was doing so under and by virtue of his said employment by said American Express Company."*

This assumption that the Express Messenger was an employe of the Railroad Company, which constitutes the entire basis of the Brief of Plaintiff in Error, is also rendered impossible by the undisputed testimony of Mrs. West that the employment of Mr. West, the Express Messenger, at the time of his death was under the American Express Company, by the undisputed testimony of Mr. Bird, Superintendent of the American Express Company, that West was working directly under his supervision and by the undisputed testimony of Mr. Adams of the American Express Company on cross-examination that all of West's salary was paid by the American Express Company, and that for any services West rendered in handling the passenger baggage, the Railroad Company paid the American Express Company on draft by that Company.

It will also be observed that the assumption, which constitutes the basis of the Brief of Plaintiff in Error, that West, at the time of his death, was an employe of the Railroad Company is directly in conflict with the holdings of the Trial Court, and of the unanimous decision of the State Supreme Court of Oklahoma in its Original Opinion, and again in its unanimous decision on Rehearing.

Indeed the Brief of Plaintiff in Error contains nothing that relates to the motions except an attack upon the Findings of Facts made by the State Supreme Court of Oklahoma, *that West at the time of his death was an employe of the American Express Company and not of the Railroad Company.*

The Motions of Defendant in Error to dismiss or affirm are based primarily upon the ground that the Findings of Fact of the State Supreme Court that West was not an employe of the Railroad Company, having support in the Pleadings and the Evidence precludes any Federal question in this case, and pre-

vents this Court from taking jurisdiction by Writ of Error, under the numerous decisions of this Court.

The Brief of Plaintiff in Error shows on its face that the Motion to Dismiss the Writ of Error or to Affirm the Judgment, must be granted, because the Brief makes it apparent that the Finding of Fact by the State Supreme Court that West was not an employe of the Railroad, defeats its entire argument.

But this Court by Writ of Error will not consider an attack upon pure Findings of Fact of a State Supreme Court, when an inspection of the Pleadings and Evidence disclose that such Findings of Fact have substantial support in the record. Cases cited in Brief of Defendant in Error, pages 13, 14.

The remarkable characteristic of the Brief of Counsel for Plaintiff in Error in Answer to the Motions to Dismiss or Affirm is, that in face of the unanimous Findings of Fact of the State Supreme Court directly to the contrary, and in face of its own specific allegation in its Third Amended Answer *"that said William B. West, deceased, in performing said duties in handling said baggage was doing so under and by virtue of his employment by the American Express Company,"* Counsel for Plaintiff in Error make assertion after assertion on almost every page of their Brief, that said West was an employe of the Railroad Company, solely by reason of his handling the passenger baggage.

But these assertions of Counsel for Plaintiff in Error (however positively stated and however frequently reiterated) can hardly supply such fact into the case or overcome the specific allegation in its Third Amended Answer that West handled the baggage as employe of the American Express Company.

Defendant in Error, in her Brief on the Motions to Dismiss or Affirm, at page 26, says:

> "To make any argument or claim at all that West handled the passenger baggage as employe of the Railroad Company, plaintiff in error must entirely ignore and directly contradict the specific allegations of its own Answer in that regard.

> This is not a case where the plaintiff in error has merely omitted to set up in its answer as a defense, the Federal Employer's Liability Act, (or facts necessary to bring the case within that Act,) but it is a case where plaintiff in error has gone further and affirmatively pleaded facts which render the Federal Employer's Liability Act impossible of application in this case. By the plain allegations of its Third Amended Answer plaintiff in error eliminates the possibility of any claim by it that this action should have been brought under the Federal Employer's Liability Act."

The Brief of Plaintiff in Error shows throughout that these statements quoted from the Brief of Defendant in Error are true; for its every argument entirely ignores its own allegation that said West in handling said baggage was doing so as employe of the American Express Company.

Furthermore, Plaintiff in Error in its Brief ignores, and makes no explanation of its failure to prove any contract of employment, written or oral, between the Express Messenger and the Railroad Company, and its failure to introduce the books of the Railroad Company to show that West was an employe upon their payroll, and its failure to call any official or other person connected with the Railroad Company, as a witness, to show any relationship of master and servant between West and the Railroad Company.

It will be noticed further that counsel for Plaintiff in Error nowhere in their Brief attempt to deny the testimony of witness Adams, as given on cross-examination, *that all of West's salary came from the American Express Company, and that for any work he did in handling the baggage, the Railroad Company paid the Express Company,* nor do they deny the testimony of their own witness, Bird, Superintendent of the Express Company (and which was the only testimony in respect to the matter) that West worked directly under his supervision, nor do they deny the testimony of Mrs. West, that West's employment at the time of his death was by the American Express Company, nor do they even claim any evidence in the record of any contract of employment, written or oral, made and entered into,

between West and the Railroad Company, or that the Railroad Company ever paid any money to West, or that the Railroad Company had, or claimed to have, any right to hire or discharge him.

Much of the Brief of Plaintiff in Error is occupied with matters which are not in dispute, and with questions purely local to the State Courts.

I.

(Pages 1 to 9.)

At page 9 of their Brief, and again at pages 20 to 28 inclusive, and on some other pages of their Brief, Counsel for Plaintiff in Error argue that an action coming within the Federal Employer's Liability Act must be brought under that Act, and cannot be brought under a State Statute, and that such action under the Federal Employer's Liability Act must be brought by a personal representative, as the nominal Plaintiff.

There is no controversy on these propositions. The provisions of the Federal Employer's Liability Act specifically provides that the action shall be maintained by a personal representative, and this Court has held in several decisions, since the passage of the Act, that the Act provides the exclusive remedy for an action coming within it.

If West, the deceased, for whose death the action was brought, had been an employe of the Defendant, Railroad Company, a personal representative would have been appointed, and the action would have been brought under the Federal Employer's Liability Act. But in view of the fact that West *was not* an employe of the Railroad Company, and that it would have been impossible to have proven any contract of employment between West and the Railroad Company, or that West received any compensation from the Railroad Company, the action was placed by the allegations of the Petition squarely upon the State Statutes which are quoted in the original Opinion of the Supreme Court of Oklahoma. (Appendix to Defendant in Error's

Brief on the Motions to Dismiss or Affirm, pages 76 and 77.) These State Statutes provide for the bringing of such action by the widow for the benefit of herself and her children in cases where no personal representative has been appointed, or where the deceased was a non-resident of the State of Oklahoma.

That this action was placed squarely upon the State Statutes is shown by the allegations of the Complaint, wherein it is specifically alleged "that no personal representative has been appointed" and "that the deceased was a non-resident of Oklahoma." Appendix to Brief of Defendant in Error, pages 21 to 23.

That this action was in form properly brought under the State Statutes is held by the original Opinion of the Supreme Court of Oklahoma. Appendix to Brief of Defendant in Error, page 77.

As stated by Plaintiff in Error at page 7 of its Brief, another action, (the case of Lenahan v. M. K. & T. Ry. Co., 135 Pac. Rep. 383,) growing out of the same disaster as the case at bar, was pending in the Supreme Court of Oklahoma at the same time as the case at bar.

The Lenahan case was brought under the same State Statutes as the case at bar. But in that case, the Supreme Court of Oklahoma found as a fact, that Lenahan, the deceased, was an employe of the Railroad Company (he being the engineer on one of the colliding trains) and hence, that that action should have been brought under the Federal Employer's Liability Act, and could not be sustained under the State Statutes.

The decision in the Lenahan case, therefore, shows conclusively that the Supreme Court of Oklahoma was ready to give full recognition to the supremacy of the Federal Act over the State Statute, in cases where such Act was applicable.

Counsel for Plaintiff in Error herein, at page 8 of their Brief, say:

> "As the Pleadings, evidence and proceedings in the Lenahan case and in the case at bar are strikingly similar, it cannot be understood how any distinction can be drawn

between them. If one of them is controlled by the Federal Statute, they both necessarily must be."

This language of counsel for Plaintiff in Error would seem to be pure sophistry. The opinions of the Supreme Court of Oklahoma in the Lenahan case and in the case at bar, on their face distinguish themselves completely. In the Lenahan case, the deceased, locomotive engineer, was an employe of the Railroad Company, and it was so found as a fact in that case by the Supreme Court of Oklahoma. Hence, as held in that case the action must have been brought under the Federal Employers' Liability Act. In the case at bar, the deceased, (the express messenger) was solely an employe of the Amrican Express Company, and was not an employe of the Railroad Company, and it was so found as a fact by the Supreme Court of Oklahoma in its Original Opinion, and again in its Opinion on Rehearing. Hence, the case at bar was properly brought under the State Statutes, and could not have been brought under the Federal Employers' Liability Act.

See Lenahan v. M. K. T. Ry. Co., 135 Pac. Rep. 383.

Counsel for Plaintiff in Error devote all of pages 11 to 19, inclusive, of their Brief, to citations and argument to support the proposition that this Court, on the Motions to Dismiss or Affirm, will look to the record and evidence where it is necessary, to determine for itself whether Findings of Fact of the State Supreme Court which purport to be pure Findings of Fact, and which in effect, deny the jurisdiction of this Court, are supported by the record, or are so intermingled with questions of law as to require this Court to pass on the merits of the case.

Here again, there is no dispute. This proposition has never been questioned by Defendant in Error. Indeed, Defendant in Error at pages 15 and 16 of her Original Brief, on the Motions to Dismiss or Affirm, invoked the rule in requesting this Court to see that the Findings of Fact of the State Supreme Court

in the case at bar are fully supported both by the pleadings and by the evidence, and sufficiently to ascertain that in the case at bar the Finding of Fact of the Supreme Court of Oklahoma, that West, the Express Messenger, was an employe of the Express Company, and not of the Railroad Company, was a finding upon a pure question of fact, wholly independent of any question of law.

II.

(Pages 10 to 49.)

The case of St. Louis I. M. & S. Ry. Co. v. McWhirter, 229 U. S. 265, is cited by Counsel for Plaintiff in Error in Division II of its Brief at pages 11, 12.

In that case, as shown by the quotation on page 12, "the cause of action alleged was exclusively placed on the Federal Statute." In the case at bar, the deceased (not being an employe of the Railroad,) the action was exclusively placed on the State Statute.

The case of Southern Pac. Ry. Co. v. Schuyler, 227 U. S. 601, cited by Plaintiff in Error, at pages 12 and 13 of its Brief, announces the same rule invoked by Defendant in Error, which is, *that this Court upon Writ of Error will only review Findings of Fact of a State Supreme Court sufficiently to ascertain if such Findings have sufficient support in the record, and are unmixed with questions of law, which might require a decision upon the merits.*

The same rule is likewise announced in all of the cases referred to by Counsel for plaintiff in error, on pages 13 to 17 inclusive of its Brief, and they require no consideration by this Court, as they are in no way controverted by Defendant in Error.

In fact, each and all of these cases are invoked by Defendant in Error because, the Findings of Fact of the State Supreme Court, in the case at bar, "that West, the deceased, was solely an employe of the American Express Company in handling the

passenger baggage, and not an employe of the Railroad Com pany," is fully supported, both by the pleadings and by the ev dence, and is a finding of fact not dependent upon or inte woven with any question of law.

See Brief of Defendant in Error on the Motions, pages 16, 3

Again, counsel for Plaintiff in Error devote pages 19 to 2 inclusive of their Brief to another proposition, which is n controverted in this case. They there argued that Plaintiff Error invoked the Federal Employer's Liability Act in the Brief and on their application for a rehearing in the Supren Court of Oklahoma, and that the Supreme Court of Oklahon recognized in its Opinions that Plaintiff in Error had so invok that Act.

But this does not go to the point made by Defendant in Err on the Motions to Dismiss or Affirm. It is conceded that Pla tiff in Error, in their Briefs in the Supreme Court of Oklahon argued and claimed that the Federal Employer's Liability A applied, and admitted that the State Supreme Court in Opinions, recognized that Plaintiff in Error raised and argu that point in its Brief. But the point advanced by Defenda in Error on the Motions to Dismiss or Affirm is, (pages 42- of Brief of Defendant in Error,) that nowhere in the Pleadin of Plaintiff in Error, and at no time during the trial in lower Court, or in any of its 26 assignments of error from t trial Court to the State Supreme Court did Plaintiff in Err ever mention or specify the Federal Employer's Liability A or call attention of opposing Counsel or of the Trial Court that Act or to any intention on its part to claim anything unc that Act, and hence, that there was nothing in the record, a no Assignment of Error before the State Supreme Court wh required the State Supreme Court to pass upon any quest involving the Federal Employer's Liability Act, and that State Supreme Court did not, in fact, assume to pass upon Federal Act in any way, but instead, and on the contrary fou as a preliminary fact in the case that West, the deceased,

not an employe of the Railroad Company, and hence, that there were not facts in the case upon which to predicate any question involving said Federal Act. It is true that the Opinions of the State Supreme Court recognize that Counsel for Plaintiff in Error argued and attempted to invoke the Federal Act in their Briefs in the State Supreme Court, but both opinions of the State Supreme Court, on their face, show conclusively that no Federal question was considered or decided, because under the Findings of Fact as made by the State Supreme Court, West was not an employe of the Railroad Company, and no question involving the Federal Employer's Liability Act, in fact, existed.

This is a very different proposition than that argued by Plaintiff in Error at pages 19 to 31 inclusive of its Brief and involved in the cases there cited by Plaintiff in Error. These cases were cases where there was, in fact, a Federal question, which could have been properly raised in the case, and which was, in fact, considered and decided by the State Supreme Court, though it might not have been raised at the proper time. In the case at bar, while Plaintiff in Error admittedly argued in its Briefs in the State Supreme Court with respect to the Federal Employer's Liability Act, no question involving that Act was considered or decided by the State Supreme Court, no Assignment of Error required it to do so and because by its Findings of Fact that Court denied the very existence of the preliminary facts which were necessary to involve the Federal Act.

At page 32 and top of page 33 of its Brief, Plaintiff in Error presents its three requested instructions which were denied by the Trial Court, and which it claims, invoke the Federal Employer's Liability Act, and Plaintiff in Error claims there was error in the Trial Court in refusing to give them.

These have been fully considered at pages 42 to 48, inclusive, of Defendant in Error's Brief on the Motions. There were numerous grounds for excluding each and all of these requested instructions and in none of them is the Federal Employer's Liability Act mentioned. They were excluded primarily be-

cause they were improperly worded and not correct statements of the law, and would have been misleading to the jury. Also because there was no issue under the pleadings as to any employment of West by the Railroad Company, and because there was no testimony or evidence in the case sufficient to raise an issue for the jury with respect to West being an Employe of the Railroad Company, and because, by reason of its own allegations, Plaintiff in Error was not in a position to insist upon such requests, under its Pleadings.

See Pages 43, 44, 45, Brief of Defendant in Error.

At page 33 and at pages 86 to 91, inclusive, of its Brief, Plaintiff in Error claims that the Trial Court erred in refusing to give the following instruction relating to the measure of damages:

> "If you should find for the plaintiff your verdict should be for such amount as would compensate the plaintiff for the financial loss sustained ,and you are not to permit your sympathy to influence your verdict. The plaintiff is not entitled to recover for loss of the society of deceased nor for mental anguish. Your verdict must be based upon the financial loss in dollars and cents." (Appendix, p. 185.)

Now, while this has nothing to do with any federal question and has no place in this Court, it may be said that the request was denied by the Trial Court because the charge of the trial Court had already specifically limited the amount of recovery to the pecuniary loss sustained, and anything further was discretionary with the lower Court.

But, further than this, if the Trial Court had charged the jury in the language as requested by Plaintiff in Error, it would have been plain and absolute error. And the Supreme Court of the State of Oklahoma in its Opinion on rehearing has so held.

See Appendix to Brief of Defendant in Error, pages 87 and 88.

Counsel for Plaintiff in Error, in their Brief, devote pages 34 to 46 inclusive to an analysis of the decisions of this Court,

which are referred to at pages 13 to 16 inclusive of the Brief of Defendant in Error, and which hold that nothing is removed for re-examination in this Court on Writ of Error to the Highest Court of a State, but questions of law arising upon the record, and that the Findings of Fact made by a Supreme Court of a State will be the basis of the decision of this Court.

There is nothing in the analysis which counsel for Plaintiff in Error assume to make, which needs any comment.

III.

(Pages 47 to 63.)

At pages 47 to 63 inclusive of its Brief, Plaintiff in Error asserts that the Pleadings of both parties allege that West, the deceased, handled the passenger baggage as employe of the Railroad Company.

This same argument was made by Plaintiff in Error in the State Supreme Court, and is already answered at pages 17 to 30, inclusive, of the Brief of Defendant in Error on the Motions.

However, some of the statements of Counsel for Plaintiff in Error with respect to the pleadings appear so extravagant that special reference will be made to them.

At the bottom of page 47, counsel for Plaintiff in Error say:

> "The petition of the defendant in error without reference to the other pleadings or the evidence charges that the deceased was an employe of the Railroad Company as baggageman."

There is no allegation whatever in the Petition that West was an employe of the Railroad Company. Furthermore, Counsel for Plaintiff in Error, at page 48 of its Brief, quote the allegation of the Petition with respect to the employment of West, which is as follows:

> "That at, and prior to the time of the death of said William B. West, Deceased, he was employed by the American Express Company as express messenger."

This is the only allegation in the Petition specifying the employment under which West was working, and there is absolutely no foundation for the statement of counsel that the Petition alleges any contract of employment between West and the Railroad Company.

As a matter of fact, the entire claim of Plaintiff in Error, that the Petition of Defendant in Error, alleges that West was an employe of the Railroad, is based on the statement in the Petition "that said William B. West also engaged in handling the passenger baggage upon the express cars of said Defendant Company."

But there is no allegation that West was an employe of the Railroad or that he handled the baggage in the express car *as employe* of the Railroad Company, or that West handled the baggage for the benefit of the Railroad Company, or even with the knowledge of the Railroad Company, or that the Railroad Company had any connection with the passenger baggage, or with West himself.

See Brief of Defendant in Error, pages 17, 18.

See Missouri, K. & T. Ry. Co. v. Blalack, 147 S. W. Rep. 559, where it is held in a similar case that proof of the handling of passenger baggage in an express car by an express messenger is not proof of his being an employe of the Railroad Company.

Plaintiff in Error, at pages 49 to 51 inclusive, of its Brief, refers to the case of Missouri, K. & T. Ry. Co. v. Reasor, as an authority that an express messenger, by reason of the mere fact of his handling passenger baggage must be presumed to be an employe of the Railroad Company.

But the Reasor case, together with the other cases cited by Plaintiff in Error at pages 71 to 80, inclusive, have no bearing whatever on any principle involved in the case at bar.

In the Reasor case, the action was founded entirely upon the theory and allegation, "that Reasor was an employe of the Railroad," and it was expressly alleged in that case that he was working, "with the knowledge, consent and procurement of the

Railroad Company," and that he, "was working for said American Express Company and for the Railroad Company, and both and each of them jointly and severally." The Reasor case, together with the other cases referred to by Plaintiff in Error merely illustrate the rule "that where a party who is not, in fact, an employe, has nevertheless, with the knowledge and consent of a defendant, has been allowed to act as or do the work of, an employe, and for the defendant's benefit, even though without proper authority, the defendant will be held to the same degree of care with respect to him while so engaged with defendant's knowledge as though he were in fact an employe." In other words, those cases hold that so far as the liability of the defendant is concerned under certain circumstances, a person allowed to work as though he was an employe and with the knowledge of the beneficiary thereof would be entitled to the rights of an employe.

It is merely an equitable rule of law that may be applied where the real contract of employment is not shown. The Supreme Court of Oklahoma with respect to these cases in its Opinion upon page 85 of the Appendix to Defendant in Error's Brief, says:

> "Those cases are so clearly distinguishable from the one at bar that we do not deem it necessary to notice them further than to say that in our judgment they are in no way in conflict with the conclusion herein reached."

At pages 52 to 53 of its Brief, Plaintiff in Error makes a labored argument that the Petition must be construed to allege that the Express Messenger was also an employe of the Railroad Company, else he would be a trespasser. And Counsel for Plaintiff in Error, in their Brief, at pages 52 and 53, say:

> "Unquestionably, the defendant in error herein sought to hold the plaintiff in error liable because it occupied the relation of master to the deceased. Unless such a relation did exist, the petition does not state a cause of action, because it does not show any right in the deceased to be upon the train." * * * and further:
>
> "This demurrer was overruled by the trial court upon

the theory that the allegations of the complaint were sufficient to charge that the deceased was in the employ of the railway company and therefore thus showed the right of the deceased to be upon the train at the time of the accident."

These statements of Counsel for Plaintiff in Error have nothing in the record upon which to rest. Had defendant in Error sought to hold the Plaintiff in Error on the ground that West was an employe of the Railroad Company, she would have alleged such employment specifically.

Nor was the Demurrer to the Complaint overruled on any such theory. On the contrary, the Demurrer to the Petition was overruled because the Petition alleged:

"That at and prior to the time of the death of said William B. West, deceased, he was employed by the American Express Company as Express Messenger upon the express cars operated by said Defendant Company, * * *."

"That on May 15th, 1908, at about 12 o'clock noon of said day, said William B. West, *in the course of his employment* as hereinbefore set out, *was riding in one of the express cars* of said Defendant Company, * * *."

"And that when said train reached a point in said State of Oklahoma, a short distance southerly of the Arkansas River between the said stations of Verdark and Muskogee in said State of Oklahoma, said train, upon which said William B. West *was so riding in the performance of his duties* as aforesaid, was by said Defendant, Railroad Company, through gross carelessness and negligence upon its part, etc."

These allegations of the Petition show that West at the time of his death was an Express Messenger in the employ of the American Express Company, and that he was at that time riding in the express car in the performance of his duties as such. These allegations clearly negative any claim that West was a trespasser, and show that as such Express Messenger riding in the performance of his duties as such, he was, so far as the Railroad Company was concerned, at least prima facie, a passenger.

See cases cited in Brief of Defendant in Error on the Motion at page 22.

In American and English Encyclopedia of Law, Second Ed., Vol. 5, page 512, the general rule is stated as follows:

> "Where a railroad company, without any express contract, undertakes to carry an express messenger in a car provided by it for the use of the express company, it owes to him the same duty to use every reasonable precaution to carry him safely that it owes to an ordinary passenger."

The Demurrer to the Petition was overruled because West, under the allegations of the Petition, was prima facie a passenger and rightfully upon the train in the prformance of his duties as such. The Supreme Court of Oklahoma in the case at bar, found in both of its Opinions, that under the Pleadings and the Evidence, in this case, West, as Express Msesenger, was a passenger.

The Petition therefore states a prima facie cause of action on the theory that West was an Express Messenger riding in the performance of his duties, and as such, was a passenger as to the Railroad Company, and entitled to the rights of such.

Counsel for Plaintiff in Error at pages 54 to 57 of their Brief seek to give the impression that their Demurrer was intended to reach to a question as to the application of the Federal Employer's Liability Act, and that because the Petition alleged that West also handled passenger baggage in the express car, it must be assumed solely from that fact, that West, the Express Messenger, also, was an employe of the Railroad Company, without any express allegation to that effect. But if the mere statement in the Petition "that West also handled passenger baggage," had, in fact, (which is denied) left any uncertainty or ambiguity as to the employment under which the passenger baggage was being handled, nevertheless, Plaintiff in Error did not stand on its Demurrer, nor did it move to have the Petition made more definite and certain in that regard, but on the contrary, Plaintiff in Error voluntarily joined issue, and by direct, clear and specific allegations in its Third Amended Answer supplied such defect and eliminated any such uncertainty or ambiguity of the Petition by stating unequivocally and emphatic-

ally, "that said William B. West, deceased, in performing said duties in handling said baggage was doing so under and by virtue of his employment by said American Express Company." Brief of Defendant in Error on the Motions, pages 22-27.

At pages 54 to 57 of their Brief, Counsel for Plaintiff in Error pretend to analyze their own various Answers, but in doing so they again ignore the allegation of their Third Amended Answer wherein it is stated, "that said William B. West, deceased, in performing said duties in handling said baggage, was doing so under and by virtue of his employment by said American Express Company. And, furthermore, in total disregard of this allegation in their Third Amended Answer, Counsel for Plaintiff in Error go so far as to claim that because the Third Amended Answer also alleges that the handling of the baggage was for and in behalf of and under the direction of said Railroad Company, the Answer should be construed to mean that West handled the passenger baggage as employe of the Railroad Company, directly contrary to its specific allegation in that regard.

As the handling of the passenger baggage is the only circumstance in the case at bar upon which Plaintiff in Error claims that West, the Express Messenger, was also an employe of the Railroad Company, its own direct allegation, that said West in performing his duties in handling said baggage was doing so as employe of the American Express Company, of itself refutes, precludes and renders impossible every argument which Counsel for Plaintiff in Error has sought to make to the contrary.

See Brief of Defendant in Error on the Motions, pages 25, 26.

Yet, at pages 56 and 57 of their Brief, Counsel for Plaintiff in Error, continue to assert that their Third Amended Answer alleges that West was an employe of the Railroad Company, by reason of handling the passenger baggage in his express car.

At pages 57 to 60, inclusive, and again at pages 82 and 83 of their Brief, Counsel for Plaintiff in Error claim, as they did in the State Supreme Court, that although the Answer did not

allege that West handled the passenger baggage as employe of the Railroad Company, that the Reply of Defendant in Error should be held to so allege, because in Reply to the pretended waivers of the right of action which Plaintiff in Error pleaded as a defense, Defendant in Error pleaded two Sections of the Kansas Statutes, making such contracts of waiver void, one of which Sections, as Counsel for Plaintiff in Error point out, rendered such contracts of waiver void as to employees of Railroads. But the other of said Sections of the Kansas Statutes so pleaded in the Reply, rendered such contracts of waiver void as to Express Messenger and other persons *not* employes of the Railroad Company.

Both Sections of the Kansas Statutes were pleaded, for the reason that both stand together and both were considered in the case of Sewell v. Railroad Company, 78 Kansas 18, 26, which was the case mainly relied upon by Defendant in Error in the Trial Court to show that the waivers offered in the case at bar were void.

In the Sewell case, it was held by the Supreme Court of Kansas that the deceased, being an express messenger and not an employe of the Railroad Company, the Section of the Kansas Statutes which rendered such waiver void as to employees of Railroads did not apply, but that the Second Section of the Kansas Statutes, (also pleaded by Defendant in Error in the case at bar,) which rendered such waiver void, as against other persons not employees of the Railroad Company *did* render such waiver void as to Express Messengers and others not employes of a Railroad.

The argument of Counsel for Plaintiff in Error that merely because both Sections were pleaded together, one of which related to employees of the Railroad Company, it must be assumed that Defendant in Error took the position that the Express Messenger in the case at bar was an employe of the Railroad Company is without force, for in that case, why would Defendant in Error have pleaded and relied upon the Section of the

Kansas Statute which related to persons who were not employees of the Railroad?

The State Supreme Court of Oklahoma, as well as the Trial Court, in the case at bar, held the waivers void under the Section of the Statute of Kansas which related to persons not employees of the Railroad Company, following the Sewell case, because West was the Express Messenger, and was not an employe of the Railroad Company.

See Original Opinion of the Supreme Court of Oklahoma, Appendix to Brief of Defendant in Error, page 77.
Opinion of Rehearing, page 89.

Counsel for Plaintiff in Error, at pages 61 and 62 of their Brief, comment upon the decision of this Court in the Seale case,—St. Louis, S. F. & T. Ry. Co. v. Seale, et al, 229 U. S. 156.

There is not a proposition announced in the Seale case that applies to the facts in the case at bar. In the Seale case, the evidence showed conclusively that the action came within the Federal Employer's Liability Act, and in that case, there was no allegation by Plaintiff in Error of facts that brought the action within the State Statutes and which precluded the bringing of the action under the Federal Statutes.

In the case at bar, the Railroad Company affirmatively pleaded in its Third Amended Answer that West handled the baggage as employe of the American Express Company, and it nowhere alleges that West was an employe of the Railroad Company, or that the Railroad Company had any relationship with him, except that it was transporting him as Express Messenger in the express car. Furthermore, in the case at bar, there is no evidence of any contract of employment between West and the Railroad Company or that the Railroad Company paid West any money, or had or exercised any control or direction over him, while on the other hand, the undisputed testimony of Mrs. West was that West, at the time of his death, was working under employment of the Express Company. The undisputed testimony of Mr. Bird, Superintendent of the Express Company,

was that West worked under his direct supervision, and the undisputed testimony of Adams, on his cross-examination, was that all of West's salary came from the Express Company and that the Railroad Company paid the Express Company for the handling of the passenger baggage.

And see Brief of Defendant in Error, on the Motions, pages 23-28; 30-34.

IV.

(Pages 63 to 86.)

But Counsel for Plaintiff in Error devote all of pages 63 to 86 inclusive (Division IV of their Brief) in arguing that the evidence shows that West, the Express Messenger, was an employe of the Railroad, solely by reason of his handling the passenger baggage, and directly contrary to their own allegation, and the evidence above referred to, in that regard.

At page 63 Counsel for Plaintiff in Error go as far as to assert in their heading to Division "IV" of their Brief that the evidence *conclusively* shows that the deceased was an employe of the Railroad Company, and that the Trial Court and all parties tried the case on that theory.

This statement is characteristic of the Brief of Plaintiff in Error; but it would seem strange, if there was any support in the record for such statement, that the case should have reached beyond the Trial Court, and beyond both Opinions of the State Supreme Court.

But, as shown in the Brief of Defendant in Error on the Motions, at pages 33-36, the only testimony in the record upon which Plaintiff in Error bases its assertion that West was an employe of the Railroad is the language of Adams, on his direct examination, wherein he uses the expressions "joint messenger and baggageman," and "worked for both companies."

But these statements of the witness do not go in any way to legal proof of any actual contract of employment between the express messenger and the railroad company, as the expressions

used by the witness clearly relate to the work being done by the express messenger and not to any legal relationship of master and servant. West was a "joint messenger and baggageman," in the sense that he handled both the express and the baggage, and indirectly he worked for the Railroad Company; but all of the work done by him including the handling of the baggage, was done under and by virtue of his employment by the American Express Company, *exactly as alleged by Plaintiff in Error in its Third Amended Answer.* And, lest there were any doubt about this from the language used by Adams on his direct examination, Counsel for Defendant in Error, on cross-examination, caused the witness Adams to explain exactly what he meant by his direct examination, and exactly what the relationship in fact was between West and the Express Company and the Railroad Company, when he testified on cross-examination that, all of West's salary came from the Express Company, and that for the work he did in handling the passenger baggage, the Railroad Company paid the Express Company an amount equal to one-half of his salary on draft by the Express Company.

Considering the testimony of Adams given on his cross-examination, in connection with his direct examination, and there is absolutely no testimony in the case going to show any legal contract of employment between the Express Messenger and the Railroad Company. Yet this testimony of Adams upon direct examination, as shown by the Brief of Plaintiff in Error itself, is the only testimony or evidence in the case upon which Counsel for Plaintiff in Error base their numerous claims and assertions, that the evidence shows that West was an employe of the Railroad Company.

At page 64 of its Brief, Plaintiff in Error says that while Mrs. West testified that the employment of her husband at the time of his death, was with the American Express Company, she did not say that he did not also work for the Railroad Company; and that while Mr. Bird testified, that West, at the time of his death, was working under his direct supervision as superin-

tendent of the Express Company, he did not say that West might not have also been working under someone connected with the Railroad Company.

This is characteristic argument of Plaintiff in Error, and no comment will be made upon it.

At page 66 to 69 of its Brief, Plaintiff in Error assume to make argument with respect to the printed circular letter that was excluded by the Trial Court, notwithstanding that the State Supreme Court of Oklahoma refused to consider any argument with respect to the circular, because Plaintiff in Error made no assignment of error to the State Supreme Court with respect to its exclusion, and because Plaintiff in Error, as required by the Rules, made no argument with respect to it in its original Brief.

See Appendix to Brief of Defendant in Error, Opinion of State Supreme Court, pages 75, 76.

The statement at the bottom of page 68 of the Brief of Plaintiff in Error, to the effect, that it was not denied by Defendant in Error that West was an employe of the Railroad Company until Defendant in Error filed her Brief in the State Supreme Court, is true only in the sense that Plaintiff in Error itself, having expressly alleged that West handled the passenger baggage as employe of the American Express Company, and as no evidence reached the record in the Trial Court of any employment of West by the Railroad Company, there was no occasion for Defendant in Error to make denial of it, until Plaintiff in Error, contrary to its own pleading and the evidence, sought to advance such claim in the State Supreme Court.

It will be observed, however, that whenever during the trial in the lower Court, Plaintiff in Error sought to make such proof by Adams and by the printed circular that West was an employe of the Railroad, Counsel for Defendant in Error objected to, and kept out, such proof, including the printed Circular, and by cross-examination of Adams, annulled whatever in his

direct examination might have appeared to indicate any employment of West by the Railroad Company.

At page 70 of its Brief, Plaintiff in Error without other basis than the testimony of Adams, on direct examination, which has been considered, makes the assertion that "in the case at bar, proof was made that West was a joint employe of the Railroad Company and the Express Company, and that the Railroad Company paid one-half of his wages," and adds that "proof was sought to be made that the Railroad Company exercised the right of control over him." There is absolutely nothing in the record upon which to base the assertion that proof was sought to be made that the Railroad Company exercised any right of control over the Express Messenger, and the assertions, based upon the direct testimony of Adams, have already been shown to have no foundation in view of the explanation made by Adams on his cross-examination.

At the top of page 71, Counsel for Plaintiff in Error argued that the payment of West's salary by the Express Company, is not controlling as to West's employment. It has never been claimed by Defendant in Error that the payment of West's salary by the Express Company would, of itself, be controlling *if* there had been proof in the record of any other element going to prove employment of West by the Railroad Company. But as before seen, the proof that all of West's salary came from the Express Company, and that the Railroad Company paid the Express Company for the work West did in handling the passenger baggage was fully corroborated by the testimony of Mrs. West with respect to West's employment by the American Express Company, and by the testimony of Mr. Bird, showing that West was working under the direct supervision of the American Express Company: Furthermore, there was absolutely no proof in the record of any contract of employment, written or oral, between West and the Railroad Company, or that anyone connected with the Railroad Company had any authority or direction over him. Nor was there proof of any other element

going to show any employment of West by the Railroad Company.

The Appendix attached by Plaintiff in Error, to its Brief, is a duplicate of the Appendix attached to the Brief of Defendant in Error, to which Plaintiff has added and printed its "application and argument for a rehearing in the State Supreme Court." Counsel for Plaintiff in Error, in the State Supreme Court, attached to its application for a rehearing a pretended contract (printed in its Appendix to its Brief on the Motions in this Court at pages 224 to 233, inclusive), which it does not even claim was offered in evidence in the Trial Court, but which it claims it would have offered in evidence had the Trial Court not excluded certain other evidence.

See Appendix to Brief of Plaintiff in Error, pages 218, 219.

This pretended instrument, attached to the application for a rehearing by Plaintiff in Error, not being a part of the record in the case, was properly ignored by the State Supreme Court; but Counsel for Plaintiff in Error attempt to make it a part of the Proceedings in this Court and at pages 81 and 82 of its Brief, argue with respect to this instrument and actually quote from it, in an attempt to claim that West was employed by the Railroad Company. Neither the Trial Court, nor the State Supreme Court, or Counsel for Defendnt in Error ever saw the original of this pretended instrument. But even if such an instrument ever existed, West's name is not mentioned in it, nor is there anything in it, which necessarily connects West with it, nor is there anything in it to show that West or any other Express Messenger was under any contract of employment with the Railroad Company, or that they ever worked under or saw the instrument referred to.

But Counsel for Plaintiff in Error, referring to this instrument which was never offered in evidence (and which never could have been gotten into the evidence had it been offered), at page 82 of their Brief, say: "It will further be noted that this contract also shows, contrary to the contention of counsel

for Defendant in Error and contrary to the Original Opinion of the State Supreme Court and also to its Opinion upon Rehearing, that the Railroad Company actually paid one-half of the salary of the deceased."

In answer to this, it is sufficient to say that it has never been denied that the Railroad Company paid the Express Company for allowing West to handle the passenger baggage in his express car, an amount equal to one-half of his salary, but the point is, that, precisely as testified to by Mr. Adams, (who was witness for Plaintiff in Error) *all of West's salary came from the Express Company and that for the work West performed in handling the passenger baggage, the Railroad Company paid the Express Company,* on draft by the Express Company.

At pages 82 to 86, inclusive, Counsel for Plaintiff in Error argue again, that the lower Court and both parties proceeded at the trial on the theory that West, the Express Messenger, was an employe of the Railroad Company. In view of the allegations of Plaintiff in Error, in its Third Amended Answer upon which the case was tried, and in view of the attempt of Counsel for Plaintiff in Error to make proof by the printed Circular that West was employed by the Railroad Company, this argument of Plaintiff in Error is absurd on its face, and has been fully answered in the Brief of Plaintiff in Error, on the Motions, pages 41, 42.

In furtherance of this argument, however, Counsel for Plaintiff in Error, at the top of page 84 of their Brief, attempt to make much of the question of the Trial Court—"Don't you plead, Mr. Taylor, he also handled passenger baggage?" and the answer, "Yes, sir, we plead it," as indicating that the court at that time thought it was conceded that West was also an employe of the railroad. The question and answer can bear no such construction, and if the trial court had such thought when the question was asked, its mistake must have been at once perceived by the fight of defendant in error immediately following and continuing throughout the trial to keep out such proof,

which would be in direct conflict with the pleadings. See Appendix to Brief of Deft. in Error, pgs. 52-55.

It has always been conceded in this case that West handled the passenger baggage, but in doing so, he was acting as employe of the American Express Company, as alleged by Plaintiff in Error in its Third Amended Answer, and as held by the trial Court and by both of the unanimous decisions of the State Supreme Court.

Furthermore, Counsel for Plaintiff in Error at the Trial, recognized that the question and answer above quoted did not go to the employment under which West handled the passenger baggage for immediately following the question and answer, Counsel for Plaintiff in Error said:

> "Mr. Allen: We expect to go further by this witness."
>
> See Appendix to Brief of Deft. in Error, page 53; Appendix to Brief of Plaintiff in Error, page 172.

There is absolutely nothing in the record to indicate that the trial Court or either party at the Trial proceeded on any theory that West was an employe of the Railroad Company, by reason of his handling the passenger baggage. Plaintiff in Error alleges exactly the contrary, Defendant in Error, herself, testified that West's employment was under the American Express Company and all attempts by Counsel for Plaintiff in Error to make any proof that West was employed by the Railroad Company were met by objections by Counsel for Plaintiff in Error, and the printed circular which was expressly offered by Plaintiff in Error for that purpose was objected to by Defendant in Error and excluded by the Trial Court, and the State Supreme Court in both Opinions refused to recognize such claim of Plaintiff in Error, by finding the facts to be, that the pleadings and evidence show conclusively that West handled the passenger baggage as employe of the American Express Company, and not of the Railroad Company.

V.

(Pages 86 to 91.)

At pages 86 to 91, inclusive, (Division V) of its Brief, Counself for Plaintiff in Error, seek to give this Court the impression that the Trial Court allowed the elements of "grief" and "loss of society" to be considered by the Jury with respect to the measure of damages; and seeks to infer that its requested instructions with respect to those matters was refused on the theory that grief and loss of society could be considered by the Jury. On the contrary, the Trial Court, by its charge to the Jury specifically limited the recovery that could be had in this case to the pecuniary loss sustained, (See Appendix to Brief of Deft. in Error, Charge of Court, page 62,) and even refused to allow Defendant in Error to prove financial loss to the minor children by reason of the loss of the father's society as involved in the elements of fatherly advice and moral training. Record, Appendix, page 47.

As a matter of fact, the requested instruction of Counsel for Plaintiff in Error with respect to this matter was denied, because the language of the request in several particulars was incomplete and an incorrect statement of the law, and would have been misleading to the Jury, and because the charge of the Court, as already given by the Trial Court, had sufficiently limited the recovery to the actual pecuniary loss sustained.

The Supreme Court of Oklahoma, with respect to this in its Opinion on Rehearing, at page 88 of the Appendix to the Brief of Defendant in Error, says:

> "The requested instruction was erroneous in several particulars. The first clause is misleading, for the reason that the statute upon which the action is based clearly provides and contemplates that the measure of damages shall be such amount as will fully compensate both the widow and the children for whose benefit the action accrues. The first clause of the requested instruction is that the verdict of the jury should be for such an amount as would compensate the plaintiff for the actual loss sustained, and does not mention the children. The latter part of the instruction is

> also objectionable, for the reason it does not mention the right of the minor children to compensation for any pecuniary loss they may sustain in respect to the society of the father, as involved in the elements of fatherly care, advice and moral instruction and education."

And as page 89 as follows:

> "The instruction given by the court below correctly confined the amount of recovery to the pecuniary loss sustained by the widow and children of the deceased. In our judgment, there is sufficient evidence in the record to sustain the verdict of the jury under the most limited interpretation that can be placed upon the instruction given."

Therefore, the holding of the State Supreme Court that the Trial Court did not err in refusing to give the requested instruction as requested by Plaintiff in Error, is in exact accord with the decisions of this Court in the cases cited by Plaintiff in Error at pages 88 to 91 inclusive of its Brief.

VI.

(Pages 91 to 99.)

Pages 91 to 99 inclusive (Division VI) of the Brief of Plaintiff in Error relate solely to the matter of the verdict being excessive. This has no bearing upon the Motions to Dismiss or Affirm, and is a local matter fully covered by the Opinion of the State Supreme Court on Rehearing, Appendix to Brief of Defendant in Error, pages 89, 90.

VII.

(Pages 99 to 109.)

Pages 99 to 109, inclusive, being Division VII of the Brief of Plaintiff in Error relate to the instructions of the Trial Court with respect to three-fourths of the Jury rendering a Verdict under the Constitution of Oklahoma. This argument can have no relation to the case at bar, as the Verdict in the case at bar was an unanimous Verdict, and the instruction therefore became immaterial. Furthermore, the argument with respect to

this is based wholly upon the assumption by Plaintiff in Error that the Federal Employer's Liability Act applies to this case.

VIII.

At page 110, of the Brief of Plaintiff in Error, Counsel attempt to avoid the Motions to Dismiss or Affirm by stating:

> "The questions presented in this case are of the gravest importance and some of them have never directly received the consideration of this Court as far as its Opinions disclose."

On the contrary, there is no new or important question involved in this case, nor has one been pointed out by Plaintiff in Error in its Brief. Nor could there be *any* question for this Court to consider in this case, because, West, the Express Messenger, not being an employe of a railroad company, no Federal Question is involved under the Findings of Fact of the State Supreme Court in that regard.

The arguments of counsel for Plaintiff in Error, in its *"Conclusion,"* on pages 110 to 112, inclusive, fall flat, under its own allegation as contained in its Third Amended Answer, and under the evidence in the case, which has already been considered, and under the Findings of Fact of the State Supreme Court.

SUMMARY.

All consideration of this case, by this Court, comes back to the proposition that the Supreme Court of Oklahoma in both of its unanimous Opinions has found, as a pure question of fact, wholly unmixed with, and independent of any question of law, that West, the deceased, under the pleadings and undisputed evidence, was at the time of his death, an employe of the American Express Company as Express Messenger and was not an employe of the Railroad Company.

This Finding of Fact of the State Supreme Court is directly supported by the Third Amended Answer of Plaintiff in Error, wherein it alleges:

"and defendant railway company states that said William B. West, deceased, in performing said duties in handling said baggage, was doing so, under and by virtue of his said employment by said American Express Company."

This Finding of Fact of the State Supreme Court is also directly supported by the testimony of Mrs. West, by the testimony of Mr. Bird, and by the testimony of Mr. Adams on cross-examination, which has been considered.

There is nothing in the Pleadings nor in the Evidence sufficient to present an issue contrary to this Finding of Fact of the State Supreme Court.

While Defendant in Error stands upon her Motions to Dismiss the Writ of Error for want of Jurisdiction or to Affirm the Judgment, nevertheless her Brief on the Motions to Dismiss or Affirm, filed herein, together with this Reply Brief, are sufficient also to cover the Merits of the Case, and (in the event that this Court should go beyond the Motions, and consider the Merits) are sufficient to show that the Judgment should be affirmed.

Wherefore, it is again respectfully submitted, that the Writ of Error should be dismissed, or the Judgment of the State Courts affirmed, with double costs and damages for delay, under Section 1010, Rev. Stats. and paragraph 2 of Rule 23 of this Court.

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